No. 91-1826

FILED
AUG 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

MICHAEL JAY SINGER
JONATHAN R. SIEGEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Did the district courts properly entertain these lawsuits brought by aliens seeking adjustment of status, which challenge the regulations of the Immigration and Naturalization Service (INS) articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering INS to extend that deadline?

PARTIES TO THE PROCEEDINGS

Respondents in the first case are Catholic Social Services, Inc.; National Center for Immigrant Rights, Inc.; United-California Mexican American Associations; American Federation of Labor-Congress of Industrial Organizations; United Farm Workers of America, AFL-CIO; La Communidad de San Juan; Sara Orantes de Palacios; Mercedes Aguilar de Lopez; Maria Teresa Reyes; Jose Guerroero Saravia; Efren Gonzales; Lorenza Sanchez Benuto; Carlos Alberto Medina; Benjamin Chavez; Sergio Will; Eva Garcia de Soto; and Petra Estrada de Vasquez.

Respondents in the second case are League of United Latin-American Citizens; American G.I. Forum; Hermandad Mexicana Nacional; Los Angeles County Federaltion [*sic*] of Labor, Legalization Assistance Project (AFL-CIO); United California Mexican-American Association; International Institute (San Francisco); John Doe; Raul Berumen-Flores; Martha Berumen; Mario Villa; and Martin Nava.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	2
Summary of argument	14
Argument:	
I. District courts do not have the authority to review a challenge to an INS rule regarding the basis for granting adjustment of status	17
A. A rule establishing the basis for granting adjustment of status is a "determination respecting an adjustment of status" for purposes of 8 U.S.C. 1255a(f)(1)	18
B. Traditional principles of administrative review require challenges to administrative rules regarding entitlement to relief to await an administrative determination on the facts of a particular case whenever adequate judicial review of that determination is available	20
II. IRCA prohibits federal courts from granting relief to aliens who did not file timely applications	28
Conclusion	36
Appendix	1a

TABLE OF AUTHORITIES

Cases:	
Ayuda, Inc. v. *Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991), petition for cert. pending, No. 91-1924	13, 26, 28
Bankers Trust Co. v. *Mallis*, 435 U.S. 381 (1978)	12
Bowen v. *City of New York*, 476 U.S. 467 (1986)	32, 33
Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986)	20, 23
Catholic Social Services, Inc. v. *Meese*, 820 F.2d 289 (9th Cir. 1987)	7

Cases—Continued: Page

Farrokhi v. *INS*, 900 F.2d 697 (4th Cir. 1990) 25
Foti v. *INS*, 375 U.S. 217 (1963) 21-22, 25, 27
Heckler v. *Community Health Services, Inc.*, 467 U.S. 51 (1984) 34
Heckler v. *Ringer*, 466 U.S. 602 (1984) 21, 22, 24
INS v. *Hibi*, 414 U.S. 5 (1973) 35
INS v. *Pangilinan*, 486 U.S. 875 (1988) 8, 13, 29, 30
Irwin v. *Veterans Administration*, 111 S. Ct. 453 (1990) 32, 33
Johnson v. *Robison*, 415 U.S. 361 (1974) 20
Kashani v. *Nelson*, 793 F.2d 818 (7th Cir.), cert. denied, 479 U.S. 1006 (1986) 27
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 18
Lujan v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990) 20
Martinez-Montoya v. *INS*, 904 F.2d 1018 (5th Cir. 1990) 25
McNary v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991) ..... *passim*
Melendez v. *Department of Justice*, 926 F.2d 211 (2d Cir. 1991) 27
Morales v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992) 18
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 33
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 32, 34
Toilet Goods Association, Inc. v. *Gardner*, 387 U.S. U.S. 158 (1967) 20
Webster v. *Doe*, 486 U.S. 592 (1988) 20
Whitney National v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 21

Constitution, statutes, rule, and regulation:

U.S. Const.:
Amend. I (Establishment Clause) 18
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 702 2
5 U.S.C. 703 2
5 U.S.C. 704 ..... 2, 21

Statutes, rule, and regulations—Continued: Page

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 2
8 U.S.C. 1160 6
8 U.S.C. 1255a 2, 5, 15, 16, 18, 28, 31
8 U.S.C. 1255a(a) 3, 16, 28, 32
8 U.S.C. 1255a(a)(1) 3, 16, 28
8 U.S.C. 1255a(a)(2) 9
8 U.S.C. 1255a(a)(3) 6
8 U.S.C. 1255a(a)(3)(B) 6
8 U.S.C. 1255a(b)(1) 31
8 U.S.C. 1255a(c)(1) 4
8 U.S.C. 1255a(c)(2) 4
8 U.S.C. 1255a(f) 3, 12, 13, 16, 17, 19, 27, 28
8 U.S.C. 1255a(f)(1) 14, 17, 18, 19, 27
8 U.S.C. 1255a(f)(2) 3, 19
8 U.S.C. 1255a(f)(3) 4, 29
8 U.S.C. 1255a(f)(3)(A) 19
8 U.S.C. 1255a(f)(4) 4-5, 29
8 U.S.C. 1255a(f)(4)(A) 15, 17, 19
8 U.S.C. 1255a(g)(1)(B) 18
8 U.S.C. 1105a 5, 17, 21, 27
8 U.S.C. 1105a(a) 26
8 U.S.C. 1182(a)(19) 10
8 U.S.C. 1427(a) 31
Medicare Act, Tit. I, 42 U.S.C. 401 *et seq.* 21
42 U.S.C. 405(h) 21
28 U.S.C. 2342-2350 ..... 5, 27
Fed. R. Civ. P. 58 12
8 C.F.R. (1992):
Pt. 103:
Section 103.1(f)(1)(xxvii) 4
Section 103.1(t) 4
Section 103.3(a)(3) 4
Pt. 245a 2
Section 245a.1(g) 6, 18, 5a
Section 245a.1(j) 4, 6a
Section 245a.1(r) 4, 8a
Section 245a.2(a)(1) 3, 12a
Section 245a.2(b)(8) 10, 18, 14a

Regulations—Continued: Page

Section 245a.2(b)(9) 10, 14a
Section 245a.2(b)(10) 10, 14a
Section 245a.2(d) 4, 17a
Section 245a.2(e) 4, 22a
Section 245a.2(f) 4, 24a
Section 245a.2(j) 4, 26a
Section 245a.2(o) 4, 32a
Section 245a.2(p) 4, 32a

Miscellaneous:

52 Fed. Reg. 16,208-16,209 (1987) 6
Webster's Third New International Dictionary (1986) 18

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1826

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 956 F.2d 914. The opinions of the district courts (Pet. App. 22a-28a, 40a-49a, 50a-60a) are unreported. A related opinion of the court of appeals in the first case is reported at 820 F.2d 289. A related opinion of the district court in the first case (J.A. 54-77) is reported at 685 F. Supp.

1149. A related unreported opinion of the court of appeals in the first case appears at J.A. 27-47. Related unreported opinions of the district court in the first case appear at J.A. 14-17, 21-25, and 48-53. A related unreported opinion of the district court in the second case appears at J.A. 211-234.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The petition for a writ of certiorari was filed on May 13, 1992. This Court granted the petition on June 22, 1992. J.A. 235. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a is set forth at Pet. App. 99a-119a.

2. 5 U.S.C. 702, 703, and 704 are set forth at Pet. App. 120a-121a.

3. 8 C.F.R. Pt. 245a is set forth in the Appendix, *infra*, 1a-92a.

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency. See 8 U.S.C. 1255a. IRCA permitted aliens to apply to INS to adjust their status to that of an alien lawfully admitted for temporary residence. *Ibid.* The statute set out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the

United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); (3) admissibility to the United States as an immigrant; and (4) that they filed an application during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] 8 U.S.C. 1255a(a).

A key concern of IRCA was to ensure that the adjustment program was limited to a finite period and proceeded in an expeditious manner. Accordingly, as noted above, an express condition for eligibility, set forth in Section 1255a(a)(1), limited relief to aliens who applied in a timely manner; Section 1255a(f)(2) provides that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." Section 1255a(f) also established the process for judicial and administrative review of adjustment determinations based on factors other than a lack of timeliness. First, paragraph (1) of Section 1255a(f) makes the statutory procedures exclusive, by providing that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review." Finally, paragraph (4) provides that judicial review will be available "only in

[1] The Attorney General extended the program as long as possible, designating the twelve-month application period to begin on the last permissible day, May 5, 1987, and to continue through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

the judicial review of an order of deportation under [8 U.S.C. 1105a]."

In response to IRCA, INS adopted several regulations delineating the process of administrative review contemplated by the statute. First, INS required aliens to file an application either at one of INS's legalization offices, or with a "qualified designated entity" authorized to receive applications. 8 C.F.R. 245a.1(j), .1(r), and .2(e); see 8 U.S.C. 1255a(c)(1) and (2).[2] The regulations gave detailed guidance regarding the types of documentation aliens could use to prove their eligibility for relief, 8 C.F.R. 245a.2(d), and, with limited exceptions, required an immigration officer to interview each applicant. Section 245a.2(j). The initial decisions with respect to the applications were made by the directors of INS's regional processing facilities. Section 103.1(t). Those officers were required to notify the applicants of decisions in writing, explain the specific reason for denials, and advise the applicants of their right to appeal. Sections 103.3(a)(3), 245a.2(o). Finally, pursuant to Sections 103.1(f)(1)(xxvii) and 245a.2(p), applicants had thirty days to appeal the decision of the regional processing facility to the Associate Commissioner, Examinations (Administrative Appeals Unit).

Because 8 U.S.C. 1255a(f)(3) provides that there can be only "a single level of administrative appellate review," and Section 1255a(f)(4) provides that ju-

[2] In the case of an application filed with a qualified designated entity, the application was deemed filed with the legalization office on the date it was filed with the qualified designated entity, provided that the applicant consented to the entity's forwarding the application to the legalization office. 8 C.F.R. 245a.2(f).

dicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]," an unsuccessful applicant can challenge the Associate Commissioner's decision only after the conclusion of administrative deportation proceedings. Under 8 U.S.C. 1105a, an applicant may appeal a final adverse decision in a deportation proceeding to the appropriate regional court of appeals, in accordance with the provisions of 28 U.S.C. 2342-2350. See 8 U.S.C. 1105a (incorporating the provisions of 28 U.S.C. 2342-2350 by reference).

The legalization programs attracted "amnesty" applications on an unprecedented scale. Over three million applications were filed, 1,763,381 of which were seeking adjustment of status under Section 1255a.[3] More than 99% of those applications have been processed, with approximately 94% of the processed applications being approved.[4]

2. The matter before the Court involves two consolidated cases challenging two different INS regu-

[3] Those statistics do not include filings made after the deadline by members of the respondent classes.

[4] INS has advised us that as of June 27, 1992 it had granted relief in 1,645,862 of the 1,750,530 applications for adjustment of status that it had completed processing as of that date. These statistics reflect slightly fewer applications than the statistics the government provided to the Court at the time of *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), see Gov't Br. 4 & n.3, No. 89-1332 (Oct. Term, 1990). This decrease is attributable to the withdrawal of applications for a variety of reasons. For example, some applicants received other immigration benefits not dependent on adjustment of status, some applicants died, and some filed duplicate applications under both programs.

lations interpreting the statutory requirements for eligibility for adjustment of status.

a. The first case involves Section 1255a(a)(3), which provides that an alien generally is not eligible for adjustment under IRCA unless he has remained in this country continuously since November 6, 1986. Section 1255a(a)(3)(B) mitigates this requirement by providing that an alien should not be considered to have failed to maintain continuous physical presence in the United States solely because of "brief, casual, and innocent absences from the United States." Shortly after IRCA was passed, INS interpreted this provision to exclude any absences not authorized by INS in advance, on the theory that absent INS permission, the alien's reentry after the absence was unlawful and thus not "innocent." See 52 Fed. Reg. 16,208-16,209 (1987) (codified at 8 C.F.R. 245a.1(g)).

On November 12, 1986, respondents Catholic Social Services, Inc. and other organizations and individuals interested in INS's interpretation of the "brief, casual, and innocent absences" provision commenced an action in the United States District Court for the Eastern District of California. J.A. 1. On November 24, 1986, the district court certified a class including all persons believed by the government to be deportable who could establish a prima facie claim for adjustment of status. *Id.* at 14-17.[5] On the same

[5] The description in the text refers to the first of two subclasses certified by the court. The district court also certified a second subclass of aliens seeking relief under the Special Agricultural Worker program established by 8 U.S.C. 1160, see J.A. 15, but issues concerning those aliens are not before this Court. The district court finally resolved those claims in an August 11, 1988 order, see *id.* at 3 (docket entry 188), and neither party appealed to the court of appeals.

day, the district court issued a temporary restraining order (*id.* at 21-25) barring INS from deporting any member of the class who would have been prima facie eligible for legalization under IRCA except for a "brief, innocent and casual unauthorized departure." *Id.* at 22.

The government appealed, and the court of appeals reversed. J.A. 27-47. The court noted that a temporary restraining order is not "[o]rdinarily * * * an appealable order," *id.* at 31, but concluded that "the substance of the proceeding" in the district court justified characterization of the district court's order as an appealable preliminary injunction, explaining that the order went "beyond merely preserving the status quo and impair[ed] [INS's] ability to control the borders and prevent illegal immigration." *Id.* at 32-33. On the merits, the court of appeals concluded that the district court erred in issuing the temporary restraining order because the "Attorney General has presented us with a reasonable construction of the IRCA," and "[t]he district court therefore abused its discretion by concluding CSS was likely to succeed on the merits." *Id.* at 41.[6]

After further proceedings in the district court, the district court narrowed the class certification (J.A. 48-53) to include only "persons prima facie eligible for legalization * * * who departed and reentered the United States without INS authorization * * * following what they assert to have been a brief, casual and innocent absence from the United States." *Id.* at 50. In May 1988, notwithstanding the court of

[6] The court of appeals subsequently vacated this opinion, when INS withdrew the challenged regulation. 820 F.2d 289 (1987).

appeals' opinion regarding the temporary restraining order, the district court granted summary judgment to respondents and enjoined INS from enforcing its administrative interpretation. *Id.* at 54-77.

Turning to remedial issues, the court issued an opinion on June 10, 1988 (Pet. App. 22a-28a), requiring INS to identify all members of the class whose applications were denied on the basis of the challenged regulation, to "rescind such denials * * * and readjudicate such applications in a manner consistent with the court's order." *Id.* at 24a. Moreover, the court required INS, notwithstanding the statutory cutoff for acceptance of applications, to continue until November 30, 1988 to accept adjustment applications from class members who claimed that "they knew of [INS's] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application." *Id.* at 25a.[7]

In response to this Court's June 17, 1988 decision in *INS* v. *Pangilinan*, 486 U.S. 875, the government filed a motion to vacate that portion of the district court's decision extending the filing deadline established by Congress.[8] After further briefing, the district court denied the motion. Pet. App. 40a-49a. Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," *id.* at 42a n.2, the court concluded that it had power to extend the statutorily imposed deadline. Although it "recognize[d] that there is dicta in [*Pangilinan*] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose." *Id.* at 42a.

Noting the possibility that it might be incorrect in its narrow reading of *Pangilinan*, the court also entered an alternative injunction, to become "effective immediately upon the reversal of [the court's earlier] order." The alternative order effectively required petitioners to allow the challenged class members to remain in this country indefinitely. See Pet. App. 42a-43a (petitioners "will be barred from excluding deporting, or subjecting to voluntary departure any [class] members * * * and must grant such aliens work authorizations"). Paragraphs 3(a) through 3(g) of the same order establish detailed procedures for implementation of this alternative injunction. See Pet. App. 43a-49a.

b. The second case concerns 8 U.S.C. 1255a(a)(2), which provides that an alien is not eligible for relief under IRCA unless he has resided continuously in this country in an unlawful status since before January 1, 1982. INS interpreted this provision to mean that an alien who left the United States and then reentered using a facially valid nonimmigrant visa or other documentation was not eligible for re-

[7] The court also issued a supplemental order on August 11, 1988 requiring INS to advise individuals in its custody of any rights they might have under the district court's prior orders. Pet. App. 29a-33a.

[8] On June 24, 1988, while it was considering the government's motion, the district court entered a stay of the government's obligation to accept and dispose of applications, requiring the government instead to refrain from deporting or otherwise removing any individuals who were members of the class. Pet. App. 34a-39a. The district court vacated the stay when it rejected the motion on August 11, 1988. See *id.* at 43a.

lief, because the use of facially valid documentation made the subsequent residence lawful for purposes of this section of IRCA. See 8 C.F.R. 245a.2(b)(8).[9]

In July 1987, respondents League of United Latin American Citizens and various individuals brought an action challenging the regulation in the United States District Court for the Central District of California. See Pet. App. 8a. Although INS withdrew the challenged regulation in October 1987,[10] the suit continued, and the district court certified a class of individuals who were deemed ineligible for relief solely because of the challenged policy and, "relying upon information that they were ineligible, did not apply for legalization [on or] before the May 4, 1988 deadline." See J.A. 215-216. In July 1988 the district court held that the original INS policy had been invalid. *Id.* at 211-234.

Finally, in August 1988 the court issued a remedial order (Pet. App. 50a-60a), requiring that until November 30, 1988, INS would continue to accept applications for relief from aliens who claimed that they would have applied for relief in a timely manner but

---

[9] On its face, 8 C.F.R. 245a.2(b)(8) states that an alien will remain eligible for relief as long as his reentry was "not documented on Service Form I-94, Arrival-Departure Record." This has the effect of barring relief for aliens who entered with facially valid documents, because their entry would have been documented on an I-94.

[10] INS altered the regulations by issuing 8 C.F.R. 245a.2(b)(9) and (10). Subparagraph (9) provides that an alien is eligible for relief even if his entry is noted on the I-94, but subparagraph (10) conditions this on the alien's securing a waiver of the provision in 8 U.S.C. 1182(a)(19) that requires exclusion of aliens who enter the United States by fraud. See Pet. App. 8a-9a.

for INS's interpretation of the "continuous unlawful residence" provision. The district court noted that the application requirement is "a jurisdictional requirement and not simply a statute of limitations," *id.* at 52a, and thus agreed with the government that the time period could "not be equitably tolled," *id.* at 53a. The court also noted that equitable tolling would be unavailable because of respondents' failure "to demonstrate affirmative misconduct by the INS," *ibid.*, explaining that "malfeasance * * * cannot be presumed simply because the INS promulgated regulations which have been held to be invalid," *id.* at 54a. Nevertheless, the district court concluded that it had the power to extend the deadline, on the theory that the Attorney General effectively had failed to designate a twelve-month period by promulgating incorrect regulations during the designated period. *Id.* at 55a-56a.

3. Although the government determined not to challenge the two district court rulings rejecting INS's interpretations of IRCA, it nevertheless appealed both cases to the Ninth Circuit. The appeals challenged both the district courts' authority to entertain the cases and to grant relief extending the statutory cutoff for filing applications.[11] Pursuant to an expedited scheduling order, the court heard oral argument in the *CSS* case on November 18, 1988.[12]

---

[11] Because INS had ceased to enforce the challenged regulations, it did not challenge application of the district court orders to individuals who had filed timely applications, who would have been able to secure the same relief granted by the district courts on appellate review. See Gov't C.A. Br. 3, 9 n.3.

[12] After issuing three temporary stays in the *CSS* case, see Pet. App. 94a, 95a, 96a, the court of appeals issued an order on September 20, 1988 (*id.* at 97a-98a), partially granting the

The court of appeals held the case pending this Court's disposition of *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and finally rendered a decision more than three years after argument, on February 13, 1992.

a. The court first rejected the government's argument that 8 U.S.C. 1255a(f) precluded district court jurisdiction over the two cases.[13] Pet. App. 10a-15a. The court of appeals relied heavily on this Court's decision in *McNary*, which involved similar provisions of IRCA related to relief for agricultural workers. The court reasoned that *McNary* limited the effect of Section 1255a(f) to "denials of *individual* * * * applications," Pet. App. 12a. Because this case did not involve an individual application, but a class-wide challenge to the standards to be applied to in-

government's motion for a stay pending appeal. The order incorporated by reference the terms of a temporary stay issued by the *CSS* district court on June 24, 1988, see note 8, *supra*. The court subsequently consolidated the *LULAC* case with the *CSS* case and accepted briefs in the *LULAC* case without ordering further arguments.

[13] As the court of appeals noted, the district court in the *LULAC* case did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. See Pet. App. 10a n.3. This Court's decision in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-388 (1978), however, establishes that the separate-judgment requirement can be waived. The court of appeals correctly concluded that the requirement in fact was waived in this case, because "both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal." Pet. App. 10a n.3. In any event, even if this requirement had not been waived, the court of appeals still would have had jurisdiction over the appeal in the *CSS* case, which adequately presents the questions raised by the petition. Respondents did not challenge this point in their brief in opposition to the petition.

dividual applications, the court concluded that jurisdiction was available under *McNary*. *Id.* at 14a. The court acknowledged that the District of Columbia Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), petition for cert. pending, No. 91-1924, had read *McNary* to give Section 1255a(f) a much more preclusive effect—barring judicial review of any issues "that go to the heart of an applicant's claim," even if presented on a "class-wide" basis, as in this case. Pet. App. 15a (quoting *Ayuda*, 948 F.2d at 749). The court of appeals nevertheless "decline[d]" to "follow the D.C. Circuit's * * * decision." Pet. App. 14a.

b. The court of appeals also rejected the government's argument that *Pangilinan* barred the district courts from extending the application deadline. Pet. App. 15a-19a.[14] In the Ninth Circuit's view, *Pangilinan* could be distinguished on several grounds: *first*, that the remedy imposed here was not naturalization, but simply an order requiring INS to consider applications for adjustment of status, *id.* at 16a-17a; *second*, that, "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress," *id.* at 17a[15]; and *third*, that *Pangilinan* had been influ-

[14] Because the court of appeals upheld the district court's direct extension of the deadline, it did not consider whether to uphold the district court's alternative injunction (described at page 9, *supra*), which indirectly accomplished the same result by prohibiting INS from deporting aliens who filed untimely applications and by requiring it to grant them work authorizations. See Pet. App. 7a.

[15] The court stated that the deadline at issue in *Pangilinan* had been part of the statute, and suggested that IRCA differed because "Congress did not provide a specific cutoff date for amnesty applications [in IRCA]." Pet. App. 18a.

enced by subsequent legislative developments indicating that Congress would not have approved of an extension of the deadline. The court noted contrasting circumstances in this case, where the comments of a Senator debating a subsequent bill suggested that Congress would have approved of a judicial extension of the deadline. *Id.* at 18a-19a.

c. Because the long delay in deciding the cases had allowed the initial time period set forth in the district courts' injunctions to expire, the court of appeals remanded the cases to the district courts to provide a further extension of the application period, equivalent to the periods originally ordered. Pet. App. 19a.[16]

SUMMARY OF ARGUMENT

1. Section 1255a(f)(1) precludes district court review of "a determination respecting an application for adjustment of status." A determination of the substantive requirements for granting an application is just such "a determination respecting an application for adjustment of status." Accordingly, Section 1255a(f)(1) bars review by the district courts of the

[16] The government filed a motion (Pet. App. 61a-98a) seeking an order staying the government's obligation to continue accepting applications pending disposition of this petition, but the court of appeals instead stayed the mandate, leaving in place the existing stays, discussed in note 12, *supra*. Since this Court granted the government's petition for a writ of certiorari, the government has asked the court of appeals to issue the mandate, so that the six-month period finally can begin running. Even if the period runs before this Court resolves the case, the case will not become moot, because the decision in this case will resolve whether INS must grant relief to aliens who applied after the statutory deadline, but before the judicial deadline.

consistency of such regulations with Section 1255a. Review is available "only in the judicial review of an order of deportation under [Section 1105a]." Section 1255a(f)(4)(A).

Applying Section 1255a to bar district court review of substantive regulations is consistent with both traditional principles of administrative law and this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). Ordinarily, individuals seeking relief from administrative agencies cannot challenge the agency's views regarding the requirements for relief until they seek relief through appropriate administrative proceedings. This Court has, however, allowed direct challenges in district court when necessary to preserve some avenue for judicial review of administrative action, especially when the action is alleged to violate the Constitution. Conversely, when Congress has created an adequate opportunity for judicial review, and declared that opportunity to be exclusive, there is no need (or justification) to find alternate means of review. This is especially so when the substance of the claim is that an agency determination that would result in an incorrect denial of relief justifies the claimant in foregoing the administrative process altogether so that he effectively can obtain judicial relief without entering the administrative process at all.

Applffiication of these principles shows that the district courts should not have entertained these cases. As a practical matter, respondents sought a declaration that INS regulations regarding the requirements for adjustment of status were incorrect. Furthermore, the statute provides for meaningful judicial review by allowing applicants to challenge application of the regulation to their individual fact

situations in the court of appeals. Finally, because the record produced in the administrative proceeding would contain all of the information relevant to respondents' claims, there is no need for the fact-finding capacities of the district courts.

Allowing respondents to proceed in district court makes a mockery of the procedures required by Section 1255a. This judicially sanctioned bypass upsets the carefully delineated scheme for judicial review Congress set forth in IRCA. As summarized above, IRCA was designed to provide one certain path for litigation with respect to eligibility for adjustment of status. Allowing respondents to maintain these class actions in the district courts eviscerates the congressional policy enacted with clarity in Section 1255a(f) by creating a second means of judicial review that bypasses adjudication by the expert administrative agency and thus gives the individual members of the respondent classes a choice of forum inconsistent with the statute.

2. The court of appeals also erred in granting relief to individuals who did not file applications for relief in a timely manner. Section 1255a(a) establishes four substantive requirements for relief. The first is that the individual file an application before a date certain. Section 1255a(a)(1). The individual members of the respondent classes did not do so. Accordingly, even if they would have been entitled to relief had they sought adjustment of status in a timely manner, they do not, and cannot, fall within the class for whom Congress authorized adjustment of status.

Respondents cannot evade this result by suggesting that the district court order is akin to equitable tolling. The doctrine of equitable tolling does not au-

thorize a court to ignore the substantive requirements for relief enacted by Congress. Moreover, equitable tolling is not justified simply by an agency's expression of views that would lead to the denial of relief. The customary way to proceed in such a situation is to seek relief and challenge the agency's denial of relief through appropriate mechanisms for administrative and judicial review. Respondents' failure to comply with the statutory requirements for relief should not be altered by judicial order.

ARGUMENT

I. DISTRICT COURTS DO NOT HAVE THE AUTHORITY TO REVIEW A CHALLENGE TO AN INS RULE REGARDING THE BASIS FOR GRANTING ADJUSTMENT OF STATUS.

Section 1255a(f)(1) of Title 8, United States Code, provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." The only provision of Section 1255a(f) providing for judicial review is Section 1255a(f)(4)(A), which allows "judicial review * * * only in the judicial review of an order of deportation under [8 U.S.C. 1105a]." Section 1105a, in turn, provides for review only in the courts of appeals. Accordingly, if respondents' claims challenge a "determination respecting an application for adjustment of status," the district courts erred in entertaining these cases.

A. A Rule Establishing the Basis for Granting Adjustment of Status Is a "[D]etermination [R]especting an [A]pplication for [A]djustment of [S]tatus" for Purposes of 8 U.S.C. 1255a(f)(1).

Contrary to the court of appeals' conclusion, a fair reading of the language of Section 1255a suggests that respondents' claims are barred by Section 1255a (f)(1). Section 1255a(g)(1)(B) required the Attorney General to "prescribe * * * such * * * regulations as may be necessary to carry out [Section 1255a]." In response to this requirement, the Attorney General adopted a number of regulations delineating the qualifications for adjustment of status. In these cases, respondents challenge the determinations reflected in two of those regulations, 8 C.F.R. 245a.1(g) and 245a.2(b)(8). A regulation concluding that relief is unwarranted in a particular fact pattern falls squarely within the normal usage of the term "determination." See, *e.g.*, *Webster's Third New International Dictionary* 616 (1986) (defining "determination" as "the act of deciding definitely and firmly esp[ecially] regarding a course of action"). Because the regulations would determine whether or not an application for relief would be granted, each of them is a determination "respecting" an application. See, *e.g.*, *id.* at 1934 (defining "respecting" as "in view of: * * * with regard or relation to").[17] Accordingly, the determination that members of the respondent classes are not eligible for relief is covered by Section 1255a(f)(1) and thus is not subject to challenge in the district courts.

[17] The definition suggests that "respecting" has a meaning similar to that of the phrase "relating to." As this Court has emphasized, "[t]he ordinary meaning of these words is a broad one." *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Compare *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (noting the broad meaning of the word "respecting" in the Establishment Clause of the First Amendment).

This reading is reinforced by a comparison of the language of Section 1255a(f)(1)—which refers to a "determination respecting" an application—with the phrasing used elsewhere in Section 1255a(f). The provision granting judicial review, Section 1255a(f)(4)(A), makes a narrower reference to a "denial" of an application, as does the provision precluding judicial review for a "denial" based on late filing, Section 1255a(f)(2).[18] It is natural to conclude that the broader reference to "determination" in Section 1255a(f)(1) should be applied more broadly. The result is straightforward: Section 1255a(f) provides for a single avenue of judicial review of any "determination respecting an application," Section 1255a(f)(1), namely, a challenge to a "denial * * * in the judicial review of an order of deportation," Section 1255a(f)(4)(A). If Congress had intended Section 1255a(f)(1) to bar nothing more than challenges to denials of applications, as the court of appeals seems to suggest, it would have used the term "denial," as it did elsewhere in Section 1255a(f).

[18] Another analogous reference appears in Section 1255a(f)(3)(A), which requires the Attorney General to establish a single level of administrative appellate review of a "determination described in [1255a(f)(1)]." As noted above, the Attorney General has provided for that review by allowing appeal to the Associate Commissioner for Examinations within 30 days of the denial of the application, which applies the regulatory determination to a particular application and thus provides a concrete dispute suitable for review.

B. Traditional Principles of Administrative Review Require Challenges to Administrative Rules Regarding Entitlement to Relief to Await an Administrative Determination on the Facts of a Particular Case, Especially When Adequate Judicial Review of That Determination Is Available.

As this Court has explained, general principles of administrative law counsel strongly against allowing individuals who disagree with the policies of government agencies to challenge those policies in district court before the policies actually have been applied to their cases. For example, considering an Administrative Procedure Act challenge to a broad government policy, this Court has explained that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990); see *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164-166 (1967).

On the other hand, the Court also follows a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991); see *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption carries special weight when the claims in question rest on the Constitution. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). The Court has not, however, treated the presumption that there must be *some* form of judicial review as a license for courts to fashion whatever form of judicial review might seem most expedient from the

perspective of the claimant. On the contrary, the general rule is that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see 5 U.S.C. 704 (Administrative Procedure Act provides for judicial review only in cases for which "there is no other adequate remedy in a court").

The interplay among these principles is illuminated by comparing this Court's decisions in *McNary* and *Heckler* v. *Ringer*, 466 U.S. 602 (1984). In *Heckler*, the Court refused to allow a direct suit in federal district court by an individual who believed he was entitled to reimbursement for the costs of a certain medical procedure under Title I of the Medicare Act, 42 U.S.C. 101 *et seq.*, and instead required the individual to submit a claim through ordinary administrative procedures, even though the Secretary already had promulgated a formal ruling barring compensation for that procedure. See 466 U.S. at 620-626.[19] Although Ringer, like the individual re-

[19] *Heckler* of course involved the Medicare Act rather than IRCA, but there is no reason why this should lessen the force of its statement of general principles of administrative law. The Medicare Act creates a jurisdictional scheme similar to that of IRCA, restricting review of "any claim arising under" that Act, 42 U.S.C. 405(h), much like IRCA restricts review of any "determination respecting an application." As this Court has recognized in interpreting the even narrower language of 8 U.S.C. 1105a, which provides exclusive review for any "final order of deportation," these phrases typically are construed to include not only the final administrative order, but also earlier subsidiary determinations that bear significantly on the ultimate decision on an application. See *Foti* v.

spondents in this case, had not yet sought relief in administrative proceedings and couched his claim as a challenge to a general administrative determination, the Court concluded that Ringer's claim was "essentially one requesting the payment of benefits." *Id.* at 620. As the Court explained, a rule "allow-[ing] claimants in Ringer's position to challenge in federal court the Secretary's [general determination] would be inviting them to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.* at 621. In light of the express provisions for judicial review established by the Medicare Act, the Court refused to permit that result. See *id.* at 622 (holding that claimant "must pursue his claim * * * in the manner which Congress has provided").

By contrast, the Court concluded in *McNary* that an immediate action in the district court was a proper forum for resolving certain constitutional claims regarding practices followed by INS in administering claims for relief under IRCA. The Court's opinion discussed *Heckler* at length and distinguished it in two significant ways. First, the Court distinguished plaintiffs' claims in *McNary* from Ringer's claim, characterizing the *McNary* claims as "collateral," in the sense that success in the district court would not "have the effect of establishing their entitlement to [relief]." 111 S. Ct. at 898. Second, the

INS, 375 U.S. 217, 229 (1963). In any event, as discussed below, the *McNary* Court discussed *Heckler* at length, and distinguished it for the reasons explained in the text, but did not suggest that it could be distinguished on the basis of the differing phrases of the Medicare Act and IRCA. See 111 S. Ct. at 897-899.

Court concluded that a contrary holding would "foreclose all forms of meaningful judicial review." *Ibid.*[20] Accordingly, the Court concluded that "[t]he strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of the Reform Act." *Id.* at 899.[21]

Application of those principles to these cases demonstrates the error of the court of appeals' ruling. First, the actions in these cases did seek as a practical matter to establish the class members' entitlement to relief, by resolving in their favor the only substantive issue identified with respect to respondents' circumstances.[22] Indeed, the district court's order in the *CSS* case makes this clear: INS was directed to "rescind * * *

[20] The Court discussed this problem at length, explaining that the administrative record would be inadequate to resolve the plaintiffs' constitutional claims regarding agency practices for processing applications. 111 S. Ct. at 898-899. The Court also supported its decision by analogy to the *Michigan Academy* case, which the Court explained as a case turning on "the concern that absent [district court review] there would be 'no review at all of substantial statutory and constitutional challenges.'" 111 S. Ct. at 899 (quoting *Michigan Academy*, 476 U.S. at 680).

[21] See 111 S. Ct. at 899 (Rehnquist, C.J., dissenting) (explaining that the "Court, with considerable and obvious effort, finds a way to [allow district court review], because to apply the statute as written could bar judicial review of respondents' constitutional claims").

[22] See J.A. 50 (*CSS* order covers "persons prima facie eligible for legalization * * * who departed and reentered the United States without INS authorization * * * following what they assert to have been a brief, casual and innocent absence from the United States"), *id.* at 216 (*LULAC* class includes aliens "who qualified for legalization but who were deemed ineligible for legalization under the original policy").

and readjudicate" class members' applications in accordance with the district court's interpretation of the statute. Pet. App. 24a.[23] To be sure, with respect to the individuals who had not yet filed applications, the court's order did not in fact require INS to grant relief, but simply required it to adjudicate subsequent applications in light of the district court's declaration of the applicable legal principles. But this fact only shows that respondents' claims mirror the claims the Court rejected in *Ringer*. See *Ringer*, 466 U.S. at 620 (explaining that Ringer was seeking "a declaration that the formal ruling * * * [is] invalid and an injunction compelling the Secretary to conclude that [Ringer's interpretation of the statute was correct]"). The Court's comments in that case apply well here: "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to [seek benefits]. * * * [A]ny other construction would allow claimants substantially to undercut Congress' carefully crafted scheme." *Id.* at 621.

Second, the challenges to the regulations in issue here—unlike the claims in *McNary*—are subject to "meaningful judicial review" under the procedures established by IRCA. In both cases respondents' claims amount to nothing more than contentions that

[23] As noted at note 11, *supra*, the government chose not to appeal the portion of the order relating to individuals who filed timely applications. With respect to those individuals, the order as a practical matter is duplicative of relief the individuals could have received in administrative and judicial proceedings based on INS's rescission of the regulation. The redundancy of the district court's order with respect to persons who filed in a timely manner only highlights that court's usurpation of decisional power Congress placed elsewhere.

INS would have applied incorrect standards in determining whether they were entitled to relief under IRCA.[24] Not only are such challenges cognizable under the statute's scheme for review, see, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (court of-appeals decision overturning INS decision denying adjustment of status based on an improper construction of IRCA); *Farrokhi* v. *INS*, 900 F.2d 697, 703-704 (4th Cir. 1990) (considering and rejecting an alien's challenge to INS decision denying adjustment of status), they in fact are among the most common types of challenges to an agency decision denying relief. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 230 (1963) ("Much of the litigation in deportation cases with respect to the setting aside of an administrative determination * * * involves disputed * * * matters of statutory construction."). Because the claim essentially turns on the agency's decision as to how the statute should be applied to a set of fact patterns, the administrative record setting forth the relevant facts of the applicant's situation would provide an adequate basis for judicial review of respondents' claim that INS has misinterpreted the criteria for eligibility. Indeed, by demonstrating the agency's application of its regulation in a specific factual setting, an administrative record in fact would aid judicial review of the claim.

In short, each member of the respondent class readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that would have been brought against them if

[24] See Pet. App. 5a (*CSS* complaint sought "to bar the implementation of th[e challenged] regulation"), *id.* at 8a (*LULAC* complaint "challeng[ed] the validity of the INS's fraudulent reentry regulation").

they had been denied relief.[25] If INS's interpretation of the eligibility requirements were upheld and the aliens were denied adjustment of status, that ruling would have been subject to review in the court of appeals. See 8 U.S.C. 1105a(a) (incorporating by

[25] Respondents argue (Br. in Opp. 17-20) that it is unfair and unduly burdensome to require aliens seeking adjustment of status to await the commencement and conclusion of deportation proceedings against them, and thus that IRCA should not be interpreted to require that result. This argument gains some support from the Court's statement in *McNary* regarding the rigor of the statutory scheme for review:

> [B]ecause there is no provision for direct judicial review of the denial of [relief under IRCA] unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied [relief] can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation[, which] is tantamount to a complete denial of judicial review for most undocumented aliens.

111 S. Ct. at 898. As we pointed out in our reply brief, however (see Reply Br. 5-6), this argument proves too much, for it would establish that all aliens are entitled to district court review. There is nothing unique about the situation of respondents that makes the statutory process any more burdensome for them than for the millions of other aliens for whom Congress designed the process. Accordingly, as the D.C. Circuit explained, this portion of the *McNary* opinion cannot

> be extended to the holding in the case. If it were, even an individual alien could sue in federal district court at any point prior to a deportation order * * *. That would make a hash of the legislative scheme, which envisioned an alien not only coming forward (and losing anonymity) but also becoming the subject of an actual deportation order as prerequisites to judicial review."

See *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742, 752 (D.C. Cir. 1991), petition for cert. pending, No. 91-1924.

reference the procedures for appellate review described in 28 U.S.C. 2342-2350).[26]

It should be clear beyond dispute that Section 1255a(f) would not allow an individual to seek a district court order overturning INS's denial of an application for adjustment.[27] Similarly, it is unreasonable to suggest that a single individual can avoid the preclusive reach of the statute by going directly to the district court without even filing an application. Accordingly, the court of appeals erred in holding that a group of similarly situated individuals can avoid the preclusive reach of the statute by going directly to the district court.[28] That holding affords

[26] It is worth noting that courts have concluded that the exclusivity of the review of deportation available under Section 1105a bars district court review not only of the final deportation order itself, but also of denials of relief that—like adjustment of status—would have the effect of barring deportation. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 220-232 (1963) (discretionary denials of relief in deportation proceedings). Because the relief sought by respondents effectively would bar deportation, this suit would be barred by Section 1105a even in the absence of Section 1255a(f)(1).

[27] Compare *Melendez* v. *Department of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (noting that court of appeals jurisdiction under Section 1105a is exclusive avenue for review of denials of asylum); *Kashani* v. *Nelson*, 793 F.2d 818, 822-828 (7th Cir.) (holding that district courts have no authority to entertain actions challenging denials of asylum), cert. denied, 479 U.S. 1006 (1986). If these cases correctly interpret Section 1105a—which does not contain the express preclusion of alternate forms of review set forth in Section 1255a(f)(1)—as denying claimants a choice of forum in their pursuit of ancillary relief that would bar deportation, it would be all the more odd to conclude that unsatisfied claimants for adjustment of status enjoy such a choice.

[28] To be sure, the *McNary* Court suggested that the statutory reference to a determination respecting " 'an application'

a choice of forum inconsistent with the language and intent of Section 1255a(f). The decision of the court of appeals should be reversed.

II. IRCA PROHIBITS FEDERAL COURTS FROM GRANTING RELIEF TO ALIENS WHO DID NOT FILE TIMELY APPLICATIONS.

The relief sought by respondents was created by IRCA and thus is entirely defined by the terms of Section 201 of IRCA, 8 U.S.C. 1255a. Section 1255a(a) provides that an alien is entitled to adjustment of status "if the alien meets the following requirements." The first of these requirements, set forth in Section 1255a(a)(1), is that the alien "must apply for such adjutment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General." The importance of this requirement is evidenced by the special treatment it receives in Section 1255a(f). That subsection generally establishes pro-

---

describes the denial of an individual application." 111 S. Ct. at 896. But this can hardly be read as allowing any challenge to a determination that affects multiple applications. In the first place, each individual can challenge the regulation only to the extent it "respect[s]" his own "application"; he cannot benefit from the regulation's impact on the applications of other aliens. Moreover, as the D.C. Circuit explained, under such a reading

> any class of aliens with similar claims could freely choose between filing declaratory judgment actions in district court and filing individual legalization applications with the INS—or, presumably, both. This reading would transform what the Court agreed were provisions "limit-[ing] review," [*McNary*, 111 S. Ct.] at 898, into provisions bestowing upon aliens a choice of forum.

Ayuda, Inc. v. *Thornburgh*, 948 F.2d 742, 749 n.5 (1991), petition for cert. pending, No. 91-1924.

cedures for administrative and judicial review of 1255a(f)(3) and (4), but, in a subsection headed "No review for late filings," sets out an exception barring review whenever "denial of adjustment of status [is] based on a late filing of an application for such adjustment." It is undisputed that the 12-month period designated by the Attorney General ended on May 4, 1988. See note 1, *supra*. It also is undisputed that the individual members of the respondent classes did not file applications within that period.[29] Accordingly, they are not eligible for relief under IRCA, and Congress has precluded judicial review of any decision denying relief on that basis.[30]

This Court's opinion in *INS* v. *Pangilinan*, 486 U.S. 875 (1988), which reversed a similar action of the Ninth Circuit, demonstrates the error of the Ninth Circuit's decision extending the statutory deadline for applications. In *Pangilinan*, certain citizens of the Philippines claimed eligibility for naturalization under a special statutory program that had expired in 1946. See 486 U.S. at 877-880. The applicants in *Pangilinan* argued that the tardiness of their applications should be excused in order to remedy unlawful actions of the United States government that had prevented them from filing in a timely manner: for a certain period of time the United States

---

[29] Although some members of the respondent classes did file timely applications, the government's appeal did not challenge the relief granted those individuals. See note 11, *supra*.

[30] For this reason, it is not at all clear what source of authority would justify a federal court in overturning an INS decision denying relief to respondents based on their failure to file timely applications, even if this Court concluded that the district courts properly required INS to receive and process untimely applications.

had not stationed an officer in the Philippines with authority to receive applications. See *id.* at 879-880. The Ninth Circuit held that the withdrawal of authority to receive applications was unlawful and that naturalization of the applicants would be an appropriate equitable remedy. *Id.* at 882.

This Court reversed. Responding to the notion that the judicially fashioned relief represented an appropriate exercise of the federal courts' equitable powers, this Court explained that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-884. More fundamentally, such a remedy was inappropriate because it violated the strict terms of the statute authorizing naturalization. The Court firmly noted: "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." *Id.* at 883 (brackets by Court; citation omitted).

Respondents argue (Br. in Opp. 22-23) that *Pangilinan* should be limited strictly to cases in which the court's order directly requires naturalization. Such a rule, however, would eviscerate *Pangilinan*, by allowing any court to reach the same substantive result simply by recrafting the terms of its order so that they would not directly require naturalization; the *Pangilinan* court, for example, could have ordered INS to consider the Philippine applications without regard to their lack of timeliness.[31] This case offers a ready example: the district

[31] The suggestion that district courts would recraft their decrees solely to evade the substantive import of this Court's

courts have ordered INS to consider a group of applications identified as having a single disqualifying defect and to excuse that defect. This means, to the extent the applications set forth truthful information, that INS has been ordered to grant these applications, which in turn would entitle the applicants to lawful residency status.[32] There is nothing in this Court's legal analysis that would permit such circumvention of the statutory deadline.[33]

---

judgments is not idle. Indeed, as noted at page 9, *supra*, the district court in the *CSS* case did precisely that by entering an alternative injunction—effective if this Court concluded that Section 1255a barred relief to individuals who did not file applications—requiring INS to grant those individuals an apparently permanent right to work and reside in the United States. Because IRCA is the only plausible source of authority to grant such relief, if IRCA bars the district court from requiring INS to grant adjustment of status, it must bar the district court from granting this alternative relief as well.

[32] Nor is it relevant that the relief offered by IRCA is lawful residency, rather than full naturalization. Congress's power to determine which aliens will be permitted lawful residence in this Nation is just as plenary as its power to determine who will be permitted to become a citizen. Moreover, a grant of temporary resident status is the first step in a statutory process designed to lead to citizenship. Under 8 U.S.C. 1255a (b) (1), aliens attaining lawful temporary resident status can become lawful permanent residents after a one-year waiting period. Lawful permanent residents in turn become eligible for citizenship after a five-year waiting period. See 8 U.S.C. 1427(a).

[33] The Ninth Circuit suggested that this Court's decision in *McNary* supported the relief issued here, noting that the *McNary* Court stated that its ruling would allow aliens "to have their case files reopened and their applications reconsidered." Pet. App. 17a (quoting *McNary*, 111 S. Ct. at 898). The critical difference, of course, is that the order affirmed by

Respondents also argue (Br. in Opp. 23-26) that the court of appeals' decision is nothing more than a commonplace application of the doctrine of equitable tolling discussed in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). Several significant problems beplague this argument. First, and most importantly, the argument assumes that the timeliness requirement is a statute of limitations. That is not correct. As the structure of the statute makes clear, the timeliness requirement is one of the four substantive requirements for relief, set forth in the four paragraphs of Section 1255a(a). Because Congress intended to create a program of limited duration, it provided that the class of eligible aliens would include only aliens who sought relief within the designated twelve-month period. The court of appeals erred in assuming the power to ignore this requirement.[34]

For several reasons, respondents err in relying (Br. in Opp. 25-26) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986). As the Court noted, the statute at

---

this Court in *McNary* commanded INS to reconsider under proper procedures applications that had been filed in a timely manner. The Ninth Circuit's opinion orders INS to consider untimely applications in defiance of the express, statutory requirements for granting an application.

[34] See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981) (summarily reversing a court of appeals decision waiving an application requirement in response to allegations that the claimant failed to file based on the agency's advice that the claimant was ineligible for relief; explaining that "[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

issue in *City of New York* expressly authorized tolling of the filing requirement by the Secretary. See 476 U.S. at 480. Because IRCA contains both a clear statutory requirement that an application be filed by a date certain and an express preclusion of judicial or administrative review of denials based on a failure to file in time, *City of New York* does not justify the relief affirmed by the court of appeals. Moreover, as the Court subsequently has noted, *City of New York* turned on the fact that the challenged policy was "a secret, internal policy," rather than a published regulation, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). Because the respondent classes by definition include only people who knew about the policy,[35] *City of New York* is inapplicable.

In any event, the facts of this case are not adequate to support equitable tolling. As the Court explained in *Irwin*, equitable tolling typically is available when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 111 S. Ct. at 458. Respondents plainly did not "actively pursu[e] their remedies"; if they had filed timely applications, the matter would not have reached this Court. Nor is it fair to say that government misconduct somehow tricked them into not filing. The sole government conduct at issue is the government's promulgation of

---

[35] See Pet. App. 25a (*CSS* court granted extension only to individuals who "knew of [the challenged] regulation"); J.A. 216 (*LULAC* court granted extension only to individuals who did not apply "relying upon information that they were ineligible").

its understanding of the statutory requirements, which differed from respondents' understanding.[36] The government in no way misrepresented the date of the deadline or the requirements for filing. Rather, it simply advised respondents that it believed they would not be entitled to relief even if they did file. See Pet. App. 54a (*LULAC* district court's statement that respondents have failed "to demonstrate affirmative misconduct by the INS"). The clear inadequacy of this as a basis for equitable tolling is evident from the consequences of respondents' argument: if a party's expression of its belief that it would prevail in litigation were sufficient to toll a statute of limitations, there would never be a bar of limitations in any case in which the defendant disclaimed liability. Accordingly, there is no basis for application of the doctrine of equitable tolling in this context.

We wish to emphasize that nothing in our position deprives the federal courts of the power and authority to provide effective remedies for violations of federal law. The only conduct at issue is INS's allegedly improper construction of the statute. If the individual members of respondent classes had made themselves eligible for relief by filing an application within the time period established by Congress, the courts of appeals, and this Court, if necessary, would

[36] As this Court has recognized, incorrect statements of the law by government agencies do not justify courts in excusing applicants for public benefits from complying with the law. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981); see also *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 63 (1984) (describing "the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law").

have been fully capable of ensuring that each application was evaluated in a manner consistent with the standards established by Congress. It may have been more convenient and less expensive for respondents to refrain from filing applications and proceed directly to the district court, but the inability of that court to provide a remedy does not suggest an undue limitation on the equitable powers of the federal courts; it is the necessary result of respondents' unwillingness to avail themselves of the limited opportunity for relief offered by the Nation's elected representatives.

The fundamental problem with the holding of the court of appeals is its view that the need to further its views regarding the general congressional policy behind IRCA justified it in ordering INS to ignore other provisions of the statute. Such a holding necessarily ignores the policies set forth in the provisions of the statute that limit the relief offered by Congress. As this Court explained when it rejected an earlier order by the court of appeals extending a statutory deadline in the immigration context: "Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress." *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). This Court should reverse the decision of the court of appeals ordering petitioners to act in contravention of the congressionally mandated policy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

MICHAEL JAY SINGER
JONATHAN R. SIEGEL
Attorneys

AUGUST 1992

APPENDIX

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED BY PUB. L. 99-603, THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, AND PUB. L. 100-204, SECTION 902

Sec.

245a.1 Definitions.

245a.2 Application for temporary residence.

245a.3 Application for adjustment from temporary to permanent resident status.

245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

AUTHORITY: Pub. L. 99-603, 100 Stat. 3359, 8 U.S.C. 1101, 1103, 1255a, 1255a note; Pub. L. 100-204, 101 Stat. 1331; Pub. L. 100-649.

SOURCE: 52 FR 16208, May 1, 1987, unless otherwise noted

§ 215a.1 **Definitions.**

As used in this chapter:

(a) *Act* means the Immigration and Nationality Act, as amended by The Immigration Reform and Control Act of 1986.

(b) *Service* means the Immigration and Naturalization Service (INS).

(c)(1) *Resided continuously* as used in section 245A(a)(2) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

An alien who after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States, pursuant to the stateside criteria program, shall be regarded as having been granted advance parole by the Service.

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application.

(2) *Continuous residence*, as used in section 245A(b)(1)(B) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of applying for adjustment from temporary residence to permanent resident status: No single absence from the United States has exceeded thirty (30) days, and the aggregate of all absences has not exceeded ninety (90) days between the date of granting of lawful temporary resident status and of applying for permanent resident status, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period(s) allowed.

(d) In the term *alien's unlawful status was known to the government*, the term *government* means the Immigration and Naturalization Service. An alien's unlawful status was *known to the government* only if:

(1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of *information constituting a violation of the alien's nonimmigrant status*, the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or

(2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was

subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Departure Records granting a period of time in which to depart the United States without imposition of proceedings; Forms I-210, Voluntary Departure Notice letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from Service records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of Deportable Alien;

Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Forms I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceedings, or any other Service record reflecting that the alien's nonimmigrant status was considered by the Service to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted; or

(3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the Service a report that clearly indicated

the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the Service the aforementioned report and that the school no longer has available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

(e) The term *to make a determination* as used in § 245a.2(t)(3) of this part means obtaining and reviewing all information required to adjudicate an application for the benefit sought and making a decision thereon. If fraud, willful misrepresentation or concealment of a material fact, knowingly providing a false writing or document, knowingly making a false statement or representation, or any other activity prohibited by section 245A(c)(6) of the Act is established during the process of making the determination on the application, the Service shall refer to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(f) The term *continuous physical presence* as used in section 245A(a)(3)(A) of the Act means actual continuous presence in the United States since November 6, 1986 until filing of any application for adjustment of status. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to May 1, 1987, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.

(g) *Brief, casual, and innocent* means a departure authorized by the Service (advance parole) subse-

quent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(h) The term *brief and casual absences* as used in section 245a(b)(3)(A) of the Act permits temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must comply with § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

(i) *Public cash assistance* means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain type of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

(j) *Legalization Office* means local offices of the Immigration and Naturalization Service which accept and process applications for Legalization or Special Agricultural Worker status, under the authority of the INS district directors in whose districts such offices are located.

(k) *Regional Processing Facility* means Service offices established in each of the four Service regions to adjudicate, under the authority of the INS Directors of the Regional Processing Facilities, applications for adjustment of status under section 210, 245A(a) or 245A(b)(1) of the Act.

(l) *Designated entity* means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for Legalization status.

(m) The term *family unity* as used in section 245(d)(2)(B)(i) of the Act means maintaining the family group without deviation or change. The family group shall include the spouse, unmarried minor children under 18 years of age who are not members of some other household, and parents who reside regularly in the household of the family group.

(n) The term *prima facie* as used in section 245(e)(1) and (2) of the Act means eligibility is established if the applicant presents a completed I-687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part.

(o) *Misdemeanor* means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 CFR 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

(p) *Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception, for purposes of 8 CFR part 245a, the crime shall be treated as a misdemeanor.

(q) *Subject of an Order to Show Cause* means actual service of the Order to Show cause upon the alien through the mail or by personal service.

(r) *A qualified designated entity in good-standing with the Service* means those designated entities whose cooperative agreements were not suspended or terminated by the Service or those whose agreements were not allowed to lapse by the Service prior to January 30, 1989 (the expiration date of the INS cooperative agreements for all designated entities), or those whose agreements were not terminated for cause by the Service subsequent to January 30, 1989.

Subsequent to January 30, 1989, and throughout the period ending on November 6, 1990, a QDE in good-standing may: (1) Serve as an authorized course provided under § 245a.3(b)(5)(i)(C) of this chapter; (2) Administer the IRCA Test for Permanent Residency (proficiency test), provided an agreement has been entered into with and authorization has been given by INS under § 245a.1(s)(5) of this chapter; and, (3) Certify as true and compiete copies of original documents submitted in support of Form I-698 in the format prescribed in § 245a.3(d)(2) of this chapter.

(s) *Satisfactorily pursuing*, as used in section 245A(b)(1)(D)(i)(II) of the Act, means:

(1) An applicant for permanent resident status has attended a recognized program for at least 40 hours of a minimum 60-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English/citizenship course prescribed by the recognized program in which he or she is enrolled (as long as enrollment occurred on or after May 1, 1987, course stndards include attainment of particular functional

skills related to communicative ability, subject matter knowledge, and English language competency, and attainment of these skills is measured either by successful completion of learning objectives appropriate to the applicant's ability level, or attainment of a determined score on a test or tests, or both of these); or

(2) An applicant presents a high school diploma or general educational development diploma (GED) from a school in the United States. A GED gained in a language other than English is acceptable only if a GED English proficiency test has been passed. (The curriculum for both the high school diploma and the GED must have included at least 40 hours of instruction in English and U.S. history and government); or

(3) An applicant has attended for a period of one academic year (or the equivalent thereof according to the standards of the learning institution), a state recognized, accredited learning institution in the United States and that institution certifies such attendance (as long as the curriculum included at least 40 hours of instruction in English and U.S. history and government); or

(4) An applicant has attended courses conducted by employers, social, community, or private groups certified (retroactively, if necessary, as long as enrollment occurred on or after May 1, 1987, and the curriculum included at least 40 hours of instruction in English and U.S. history and government) by the district director or the Director of the Outreach Program under § 245a.3(b)(5)(i)(D) of this chapter; or

(5) An applicant attests to having completed at least 40 hours of individual study in English and U.S. history and government and passes the proficiency

test for legalization, called the IRCA Test for Permanent Residency, indicating that the applicant is able to read and understand minimal functional English within the context of the history and government of the United States. Such test may be given by INS, as well as, State Departments of Education (SDEs) (and their accredited educational agencies) and Qualified Designated Entities in good-standing (QDEs) upon agreement with and authorization by INS. Those SDEs and QDEs wishing to participate in this effort should write to the Director of the INS Outreach Program at 425 "I" Street, NW., Washington, DC 20536, for further information.

(t) Minimal understanding of ordinary English as used in section 245A(b)(1)(D)(i) of the Act means an applicant can satisfy basic survival needs and routine social demands. The person can handle jobs that involve following simple oral and very basic written communication.

(u) *Curriculum* means a defined course for an instructional program. Minimally, the curriculum prescribes what is to be taught, how the course is to be taught, with what materials, and when and where. The curriculum must:

(1) Teach words and phrases in ordinary, everyday usage;

(2) Include the content of the Federal Citizenship Text series as the basis for curriculum development (other texts with similar content may be used in addition to, but not in lieu of, the Federal Citizenship Text series);

(3) Be designed to provide at least 60 hours of instruction per class level;

(4) Be relevant and educationally appropriate for the program focus and the intended audience; and

(5) Be available for examination and review by INS as requested.

(v) The term *developmentally disabled* means the same as the term *developmental disability* defined in section 102(5) of the Developmental Disabilities Assistance and Bill of Rights Act of 1987, Pub. L. 100-146. As a convenience to the public, that definition is printed here in its entirety:

> The term *developmental disability* means a severe, chronic disability of a person which;
>
> (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (2) Is manifested before the person attains age twenty-two;
>
> (3) Is likely to continue indefinitely;
>
> (4) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
>
> (5) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

[52 FR 16208, May 1, 1987, as amended at 52 FR 43845, Nov. 17, 1987; 53 FR 9863, Mar. 28, 1988; 53 FR 23382, June 22, 1988; 53 FR 43992, Oct. 31, 1988; 54 FR 29448, July 12, 1989; 56 FR 31061, July 9, 1991]

§ 245a.2 **Application for temporary residence.**

(a) *Application period for temporary residence.* (1) An alien who has resided unlawfully in the United States since January 1, 1982, who believes that he or she meets the eligibility requirements of section 245A of the Act must make application within the twelve month period beginning on May 5, 1987 and ending on May 4, 1988, except as provided in the following paragraphs.

(2) (i) [Reserved]

(ii) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on May 5, 1987 and ending on April 4, 1988 must file an application for adjustment of status to that of a temporary resident prior to the thirty-first day after the issuance of the Order to Show Cause.

(iii) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on April 5, 1988 and ending on May 4, 1988 must file an application for adjustment of status to that of a temporary resident not later than May 4, 1988.

(iv) An alien, described in paragraphs (a)(2)(i) through (iii) of this section, who fails to file an application for adjustment of status to that of a temporary resident under section 245A(a) of the Act during the respective time period(s), will be statutorily ineligible for such adjustment of status.

(b) *Eligibility.* The following categories of aliens, who are otherwise eligible to, apply for legalization, may file for adjustment to temporary resident status:

(1) An alien (other than an alien who entered as a nonimmigrant) who establishes that he or she entered the United States prior to January 1, 1982, and

who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(2) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose period of authorized admission expired through the passage of time prior to January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(3) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(4) An alien described in paragraphs (b)(1) through (3) of this section who was at any time a nonimmigrant exchange visitor (as defined in section 101(a)(15)(J) of the Act), must establish that he or she was not subject to the two-year foreign residence requirements of section 212(e) or has fulfilled that requirement or has received a waiver of such requirements and has resided continuously in the United States in unlawful status since January 1, 1982.

(5) An alien who establishes that he or she was granted voluntary departure, voluntary return, extended voluntary departure or placed in deferred action category by the Service prior to January 1, 1982 and who has thereafter resided continuously in such

status in the United States and who has been physically present in the United States from November 6, 1986 until the date of filing the application.

(6) An alien who establishes that he or she was paroled into the United States prior to January 1, 1982, and whose parole status terminated prior to January 1, 1982, and who has thereafter resided continuously in such status in the United States, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

(7) An alien who establishes that he or she is a Cuban or Haitian Entrant who was physically present in the United States prior to January 1, 1982, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from November 6, 1986, until the date of filing the application, without regard to whether such alien has applied for adjustment of status pursuant to section 202 of the Act.

(8) An alien's eligibility under the categories described in section 245(a)(2)(b)(1) through (7) and (9) through (15) shall not be affected by entries to the United States subsequent to January 1, 1982 that were **not** documented on Service Form I-94, Arrival-Departure Record.

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being decumented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable

charge 212(a)(19) as an alien who entered the United States by fraud.

(11) A nonimmigrant who entered the United States for duration of status ("D/S") is one of the following classes, A, A-1, A-2, G, G-1, G-2, G-3 or G-4, whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 1, 1982, and who has thereafter continued to reside in the United States in an unlawful status. An alien who was a dependent family member and who may be otherwise eligible for legalization may be considered a member of this class of eligible aliens if the dependent family member was also in A and G status when the principal A or G alien's status terminated or ceased to be recognized by the Department of State.

(12) A nonimmigrant who entered the United States for duration of status ("D/S") in one of the following classes, F, F-1, F-2, who completed a full course of study, including practical training and whose time period if any to depart the United States after completion of study expired prior to January 1, 1982 and who has remained in the United States in an unlawful status since that time. A dependent F-2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I-94, Arrival-Departure Record that extended beyond January 1, 1982 is considered eligible if the principal F-1 lien is found eligible.

(13) An alien who establishes that he or she is a member of the class in the Silva-Levi lawsuit (No. 76-C-4268 (N.D. Ill. March 22, 1977)); that is, an alien from an independent country of the Western Hemisphere who was present in the United States

prior to March 11, 1977, and was known by the Immigration and Naturalization Service (INS) to have a priority date for the issuance of an immigrant visa between July 1, 1968 and December 31, 1976, inclusive, and who was clearly eligible for an immigrant visa.

(14) An alien who filed an asylum application prior to January 1, 1982 and whose application was subsequently denied or whose application has not yet been decided is considered an alien in an unlawful status known to the government.

(15) An alien, otherwise eligible who departed the United States and was paroled into the United States on or before May 1, 1987 in order to return to an unrelinquished unlawful residence.

(c) *Ineligible aliens.* (1) An alien who has been convicted of a felony, or three or more misdemeanors.

(2) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group or political opinion.

(3) An alien excludable under the provisions of section 212(a) of the Act whose grounds of excludability may not be waived, pursuant to section 245A(d)(2)(B)(ii) of this Act.

(4) An alien who at any time was a nonimmigrant exchange visitor who is subject to the two-year foreign residence requirement unless the requirement has been satisfied or waived pursuant to the provisions of section 212(e) of the Act who has resided continuously in the United States in an unlawful status since January 1, 1982.

(5) [Reserved]

(6) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act dur-

ing the period beginning on May 5, 1987 and ending on April 4, 1988 who does not file an application for adjustment of status to that of temporary resident under section 245(A)(a) of the Act prior to the thirty-first day after issuance of the order.

(7) An alien who is the subject of an Order to Show Cause issued under section 242 of the Act during the period beginning on April 5, 1988 and ending on May 4, 1988 who does not file an application for adjustment of status to that of a temporary resident under section 245A(a) of the Act prior to May 5, 1988.

(8) An alien who was paroled into the United States prior to January 1, 1982 and whose parole status terminated or expired subsequent to January 1, 1982, except an alien who was granted advance parole.

(d) *Documentation.* Evidence to support an alien's eligibility for the legalization program shall include documents establishing proof of identity, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD-258), and a completed medical report of examination (Form I-693). All documentation submitted will be subject to Service vertification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for these three categories are discussed below.

(1) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference:

(i) Passport;

(ii) Birth certificate;

(iii) Any national identity document from the alien's country of origin bearing photo and fingerprint (e.g., a "cedula" or "cartilla");

(iv) Driver's license or similar document issued by a state if it contains a photo;

(v) Baptismal Record/Marriage Certificate; or

(vi) Affidavits.

(2) *Assumed names*—(i) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (d)(1) of this section. The assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirements of this paragraph documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(ii) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint or detailed physical description. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to affiant under the assumed name in question will carry greater weight.

(3) *Proof of residence.* Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(i) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(A) Alien's address at the time of employment;

(B) Exact period of employment;

(C) Periods of layoff;

(D) Duties with the company;

(E) Whether or not the information was taken from official company records; and

(F) Where records are located and whether the Service may have access to the records.

If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of (3)(i)(E) and (3)(i)(F) of this paragraph. This affidavit form-letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

(ii) Utility bills (gas, electric, phone, etc.), receipts, or letters from companies showing the dates during which the applicant received service are acceptable documentation.

(iii) School records (letters, report cards, etc.) from the schools that the applicant or their children have attended in the United States must show name of school and periods of school attendance.

(iv) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(v) Attestations by churches, unions, or other organizations to the applicant's residence by letter which:

(A) Identifies applicant by name;

(B) Is signed by an official (whose title is shown);

(C) Shows inclusive dates of membership;

(D) States the address where applicant resided during membership period;

(E) Includes the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(F) Establishes how the author knows the applicant; and

(G) Establishes the origin of the information being attested to.

(vi) Additional documents to support the applicant's claim may include:

(A) Money order receipts for money sent in or out of the country;

(B) Passport entries;

(C) Birth certificates of children born in the United States;

(D) Bank books with dated transactions;

(E) Letters or correspondence between applicant and another person or organization;

(F) Social Security card;

(G) Selective Service card;

(H) Automobile license receipts, title, vehicle registration, etc.;

(I) Deeds, mortgages, contracts to which applicant has been a party;

(J) Tax receipts;

(K) Insurance policies, receipts, or letters; and

(L) Any other relevant document.

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(i) Evidence of a history of employment (i.e., employment letter, W-2 Forms, income tax returns, etc.);

(ii) Evidence that he she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(iii) Form I-134, Affidavit of Support, completed by a spouse in behalf of the applicant and or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

(5) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245a of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification as set forth in paragraph (d) of this section.

(6) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

(e) *Filing of application.* (1) The application must be filed on Form I-687 at an office of a designated entity or at a Service Legalization Office within the jurisdiction of the District wherein the applicant resides. If the application is filed with a designated entity, the alien must have consented to having the

designated entity forward the application to the legalization office. In the case of applications filed at a legalization office, the district director may, at his or her discretion:

(i) Require the applicant to file the application in person; or

(ii) Require the applicant to file the application by mail; or

(iii) Permit the filing of applications either by mail or in person.

The applicant must appear for a personal interview at the legalization office as scheduled. If the applicant is 14 years of age or older, the application must be accompanied by a completed Form FD-258 (Applicant Card).

(2) At the time of the interview, wherever possible, original documents must be submitted except the following: Official government records; employment or employment-related records maintained by employers, unions, or collective bargaining organizations; medical records; school records maintained by a school or school board; or other records maintained by a party other than the applicant. Copies of records maintained by parties other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. If at the time of the interview the return of original documents is desired by the applicant, they must be accompanied by notarized copies or copies certified true and correct by a qualified designated entity or by the alien's representative in the format prescribed in § 204.2(j)(1) or (2) of this chapter. At the discretion of the district director, original documents, even if accom-

panied by certified copies, may be temporarily retained for forensic examination by the Document Analysis Unit at the Regional Processing Facility having jurisdiction over the legalization office to which the documents were submitted.

(3) A separate application (I-687) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check, or certified bank check, made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(f) *Filing date of application.* The date the alien submits a completed application to a Service Legalization Office or designated entity shall be considered the filing date of the application, provided that in the case of an application filed at a designated entity the alien has consented to having the designated entity forward the application to the Service Legalization Office having jurisdiction over the location of the alien's residence. The designated entites are required to forward completed applications to the appropriate Service Legalization Office within sixty days of receipt.

(g) *Selective Service registration.* At the time of filing an application under this section, male applicants over the age of 17 and under the age of 26 are required to be registered under the Military Selective Service Act. An applicant shall present evidence that he has previously registered under that Act in the form of a letter of acknowledgement from the Selective Service System, or such alien shall present a completed and signed Form SSS-1 at the time of

filing Form I-687 with the Immigration and Naturalization Service or a designated entity. Form SSS-1 will be forwarded to the Selective Service System by the Service.

(h) *Continuous residence.* (1) For the purpose of this Act, an applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining a residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

(2) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

(i) *Medical examination.* An applicant under this part shall be required to submit to an examination by a designated civil surgeon at no expense to the government. The designated civil surgeon shall report on the findings of the mental and physical condition of the applicant and the determination of the alien's immunization status. Results of the medical examination must be presented to the Service at the time

of interview and shall be incorporated into the record. Any applicant certified under paragraphs (1), (2), (3), (4), or (5) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

(j) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service Legalization Office and must be fingerprinted for the purpose of issuance of Forms I-688 and I-688A. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant.

(k) *Applicability of exclusion grounds*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for temporary resident status: (14) Workers entering without Labor Certification; (20) immigrants not in possession of a valid entry document; (21) visas issued without compliance with section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of exclusion.* Except as provided in paragraph (k)(3) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly

with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (k)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(iii) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(iv) Paragraph (33) (participated in Nazi persecution).

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

(5) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and or has not had a criminal record are subject to a verification of facts by the Service. The applicant

must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

(l) *Continuous physical presence since November 6, 1986.* (1) An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since November 6, 1986. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to May 1, 1987, and meet the continuous residence requirements and are otherwise eligible for legalization.

(2) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(m) *Departure.* (1) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service Legalization Office and the date status as a temporary resident is granted, the alien applicant can only be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in § 212.5(e) of this chapter.

(2) An alien whose application for temporary resident status has been approved may be admitted to the United States upon return as a returning temporary resident provided he or she:

(i) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(ii) Has not been absent from the United States more than thirty (30) days on the date application for admission is made;

(iii) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(iv) Presents Form I-688;

(v) Presents himself or herself for inspection; and

(vi) Is otherwise admissible.

(3) The periods of time in paragraph (m)(2)(ii) and (m)(2)(iii) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief temporary trip abroad due to emergent or extenuating circumstances beyond the alien's control.

(n)(1) *Employment and travel authorization; general.* Authorization for employment and travel abroad for temporary resident status applicants under section 245A(a) of the Act may only be granted by a Service Legalization Office. INS district directors will determine the Service location for the completion of processing of travel documentation. In the case of an application which has been filed with a designated entity, employment authorization may only be granted by the Service after the application has been properly received at the Service Legalization Office.

(2) *Employment and travel authorization prior to the granting of temporary resident status.* (i) Permission to travel abroad and accept employment may be granted to the applicant after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status. Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in § 212.5(e) of this chapter after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status.

(ii) If an appointment cannot be scheduled within thirty (30) days, authorization to accept employment will be given, valid to the scheduled appointment date. The appointment letter will be endorsed with the temporary employment authorization. Form I-688A, Employment Authorization, will be given to the applicant after an interview has been completed by an immigration officer unless a formal denial is issued by a Service Legalization Office. This temporary employment authorization will be restricted to six months duration, pending final determination on the application for temporary resident status.

(3) *Employment and travel authorization upon grant of temporary resident status.* Upon grant of an application for adjustment to temporary resident status by a Regional Processing Facility, the processing facility will forward a notice of approval to the alien at his or her last known address and to his or her designated entity or representative. The alien will be required to return to the Service Legalization Office where the application was initially received, surrender the I-688A previously issued, and will be

issued Form I-688, Temporary Resident Card, authorizing employment and travel abroad.

(4) *Revocation of employment authorization upon denial of temporary resident status.* Upon denial of an application for adjustment to temporary resident status the alien will be notified that if a timely appeal is not submitted, employment authorization shall be automatically revoked on the final day of the appeal period.

(o) *Decision.* The applicant shall be notified in writing of the decision, and, if the application is denied, of the reason therefor. An appeal from an adverse decision under this part may be taken by the applicant on Form I-694.

(p) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal with the required fee shall be filed with the Regional Processing Facility within thirty (30) days after service of the notice of denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the thirty (30) day period has tolled will not be accepted. The thirty (30) day period includes any time required for service or receipt by mail.

(q) *Motions.* The Regional Processing Facility director may *sua sponte* reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision that will grant the benefit which has been requested. The director's new decision must be served on the appealing party within 45 days of receipt of any briefs and/or new evidence, or upon expiration

of the time allowed for the submission of any briefs. Motions to reopen a proceeding or reconsider a decision shall not be considered under this part.

(r) *Certifications.* The Regional Processing Facility director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The party affected shall be given notice of such certification and of the right to submit a brief within thirty (30) days from service of the notice.

(s) *Date of adjustment to temporary residence.* The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at Service Legalization Office.

(t) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Justice Department or bureau of agency thereof, will be permitted to examine individual applications, except employees of designated entities where applications are filed with the same designated entity. For purposes of this part, any individual employed under contract by the Service to work in connection with the legalization program shall be considered an "employee of the Justice Department or bureau or agency thereof."

(2) Files and records prepared by designated entities under this section are confidential. The Attorney General and the Service shall not have access to these files and records without the consent of the alien.

(3) No information furnished pursuant to an application for legalization under this section shall be used for any purpose except: (i) To make a deter-

mination on the application; or, (ii) for the enforcement of the provisions encompassed in section 245A (c) (6) of the Act, except as provided in paragraph (t) (4) of this section.

(4) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A (c) (6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(5) Information obtained in a granted legalization application and contained in the applicant's file is subject to subsequent review in reference to future benefits applied for (including petitions for naturalization and permanent resident status for relatives).

(u) *Termination of temporary resident staus* [*sic*] —(1) *Termination of temporary resident status; General.* The status of an alien lawfully admitted for temporary residence under section 245A (a) (1) of the Act may be terminated at any time in accordance with section 245A (b) (2) of the Act. It is not necessary that a final order of deportation be entered in order to terminate temporary resident status. The temporary resident status may be terminated upon the occurence of any of the following:

(i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;

(ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2 (k) (2).

(iii) The alien is convicted of any felony, or three or more misdemeanors;

(iv) The alien fails to file for adjustment of status from temporary resident to permanent resident on Form I-698 within forty-three (43) months of the date he/she was granted status as a temporary resident under § 245a.1 of this part.

(2) *Procedure.* Termination of an alien's status under paragraph (u) (1) of this section will be made only on notice to the alien sent by certified mail directed to his or her last known address, and to his or her representative. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within thirty (30) days after the service of the Notice of Intent to Terminate. If the alien's status is terminated, the director of the regional processing facility shall notify the alien of the decision and the reasons for the termination, and further notify the alien that any Service Form I-94, Arrival-Departure Record or other official Service document issued to the alien authorizing employment and/or travel abroad, or any Form I-688, Temporary Resident Card previously issued to the alien will be declared void by the director of the regional processing facility within thirty (30) days if no appeal of the termination decision is filed within that period. The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal with the required fee shall be filed with the regional processing facility within thirty (30) days after the service of the notice of termination. If no appeal is filed within

that period, the I-94, I-688 or other official Service document shall be deemed void, and must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(3) *Termination not construed as rescission under section 246.* For the purposes of this part the phrase *termination of status* of an alien granted lawful temporary residence under section 245A(a) of the Act shall not be construed to necessitate a rescission of status as described in section 246 of the Act, and the proceedings required by the regulations issued thereunder shall not apply.

(4) *Return to unlawful status after termination.* Termination of the status of any alien previously adjusted to lawful temporary residence under section 245A(a) of the Act shall act to return such alien to the unlawful status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under section 236 or 242 of the Act, as appropriate.

(v) *Ineligibility for immigration benefits.* An alien whose status is adjusted to that of a lawful temporary resident under section 245A of the Act is not entitled to submit a petition pursuant to section 203(a)(2) or to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence.

(w) *Declaration of Intending Citizen.* An alien who has been granted the status of temporary resident under section 245A(a)(1) of this Act may assert a claim of discrimination on the basis of citizenship status under section 274B of the Act only if he or she has previously filed Form I-772 (Declaration of Intending Citizen) after being granted such status. The Declaration of Intending Citizen is not required as a

basis for filing a petition for naturalization; nor shall it be regarded as a right to United States citizenship; nor shall it be regarded as evidence of a person's status as a resident.

[52 FR 16208, May 1, 1987, as amended at 52 FR 43845, 43846, Nov. 17, 1987; 53 FR 23382, June 22, 1988; 54 FR 29449, July 12, 1989; 56 FR 31061, July 9, 1991]

§ 245a.3 Application for adjustment from temporary to permanent resident status.

(a) *Application period for permanent residence.* (1) An alien may submit an application for lawful permanent residence status, with fee, immediately subsequent to the granting of lawful temporary resident status. Any application received prior to the alien's becoming eligible for adjustment to permanent resident status will be administratively processed and held by the INS, but will not be considered filed until the beginning of the nineteenth month after the date the alien was granted temporary resident status as defined in § 245a.2(s) of this chapter.

(2) No application shall be denied for failure to timely apply before the end of 43 months from the date of actual approval of the temporary resident application.

(3) The Service Center Director shall sua sponte reopen and reconsider without fee any application which was previously denied for late filing. No additional fee will be required for those applications which are filed during the twelve month extension period but prior to July 9, 1991.

(b) *Eligibility.* Any alien who has been lawfully admitted for temporary resident status under section

245A(a) of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien:

(1) Applies for such adjustment anytime subsequent to the granting of temporary resident status but on or before the end of 43 months from the date of actual approval of the temporary resident application. The alien need not be physically present in the United States at the time of application; however, the alien must establish continuous residence in the United States in accordance with the provisions of paragraph (b)(2) of this section and must be physically present in the United States at the time of interview and or processing for permanent resident status (ADIT processing);

(2) Establishes continuous residence in the United States since the date the alien was granted such temporary residence status. An alien shall be regarded as having resided continuously in the United States for the purpose of this part if, at the time of applying for adjustment from temporary to permanent resident status, or as of the date of eligibility for permanent residence, which ever is later, no single absence from the United States has exceeded thirty (30) days, and the aggregate of all absences has not exceeded ninety (90) days between the date of approval of the temporary resident application, Form I-687 (not the "roll-back" date) and the date the alien applied or became eligible for permanent resident status, whichever is later, unless the alien can establish that due to emergent reasons or circumstances beyond his or her control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than

30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent residence, shall break the continuity of such residence, unless the temporary resident can establish to the satisfaction of the district director or the Director of the Regional Processing Facility that he or she did not, in fact, abandon his or her residence in the United States during such period;

(3) Is admissible to the United States as an immigrant, except as otherwise provided in paragraph (g) of this section; and has not been convicted of any felony, or three or more misdemeanors; and

(4)(i)(A) Can demonstrate that the alien meets the requirements of section 312 of the Immigration and Nationality Act, as amended (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

(B) Is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

(ii) The requirements of paragraph (b)(4)(i) of this section must be met by each applicant. However, these requirements shall be waived without formal application for persons who, as of the date of application or the date of eligibility for permanent residence under this part, whichever date is later, are:

(A) Under 16 years of age; or

(B) 65 years of age or older; or

(C) Over 50 years of age who have resided in the United States for at least 20 years and submit evidence establishing the 20-year qualification require-

ment. Such evidence must be submitted pursuant to the requirements contained in Section 245a.2(d)(8) of this chapter; or

(D) Developmentally disabled as defined at § 245a.1 (v) of this chapter. Such persons must submit medical evidence concerning their developmental disability; or

(E) Physically unable to comply. The physical disability must be of a nature which renders the applicant unable to acquire the four language skills of speaking, understanding, reading, and writing English in accordance with the criteria and precedence established in OI 312.1(a)(2)(iii) (Interpretations). Such persons must submit medical evidence concerning their physical disability.

(iii)(A) Literacy and basic citizenship skills may be demonstrated for purposes of complying with paragraph (b)(4)(i)(A) of this section by:

(*1*) Speaking and understanding English during the course of the interview for permanent resident status. An applicant's ability to read and write English shall be tested by excerpts from one or more parts of the Federal Textbooks on Citizenship at the elementary literacy level. The test of an applicant's knowledge and understanding of the history and form of government of the United States shall be given in the English language. The scope of the testing shall be limited to subject matter covered in the revised (1987) Federal Textbooks on Citizenship or other approved training material. The test questions shall be selected from a list of 100 standardized questions developed by the Service. In choosing the subject matter and in phrasing questions, due consideration shall be given to the extent of the applicant's education, background, age, length of residence in the

United States, opportunities available and efforts made to acquire the requisite knowledge, and any other elements or factors relevant to an appraisal of the adequacy of his or her knowledge and understanding; or

(*2*) By passing a standardized section 312 test (effective retroactively as of November 7, 1988) such test being given in the English language by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS). The scope of the test is based on the 1987 edition of the Federal Textbooks on Citizenship series written at the elementary literacy level. An applicant may evidence passing of the standardized section 312 test by submitting the approved testing organization's standard notice of passing test results at the time of filing Form I-698, subsequent to filing the application but prior to the interview, or at the time of the interview. The test results may be independently verified by INS, if necessary.

(B) An applicant who fails to pass the English literacy and/or the U.S. history and government tests at the time of the interview, shall be afforded a second opportunity after six (6) months (or earlier, at the request of the applicant) to pass the tests, submit evidence of passing an INS approved section 312 standardized examination or submit evidence of fulfillment of any one of the "satisfactory pursuing" alternatives listed at § 245a.1(s) of this chapter. The second interview shall be conducted prior to the denial of the application for permanent residence and may be based solely on the failure to pass the basic citizenship skills requirements. An applicant whose period of eligibility expires prior to the end of the

six-month re-test period, shall still be accorded the entire six months within which to be re-tested.

(iv) To satisfy the English language and basic citizenship skills requirements under the "satisfactorily pursuing" standard as defined at § 245a.1(s) of this chapter the applicant must submit evidence of such satisfactory pursuit in the form of a "Certificate of Satisfactory Pursuit" (Form I-699) issued by the designated school or program official attesting to the applicant's satisfactory pursuit of the course of study as defined at § 245a.1(s)(1) and (4) of this chapter; or a high school diploma or general educational development diploma (GED) under § 245a.1(s)(2) of this chapter; or certification on letterhead stationery from a state recognized, accredited learning institution under § 245a.1(s)(3) of this chapter; or evidence of having passed the IRCA Test for Permanent Residency under § 245a.1(s)(5) of this chapter. Such applicants shall not then be required to demonstrate that they meet the requirements of § 245a.3(b)(4)(i)(A) of this chapter in order to be granted lawful permanent residence provided they are otherwise eligible. Evidence of "Satisfactory Pursuit" may be submitted at the time of filing Form I-698, subsequent to filing the application but prior to the interview, or at the time of the interview (the applicant's name and A90M number must appear on any such evidence submitted). An applicant need not necessarily be enrolled in a recognized course of study at the time of application for permanent residency.

(v) Enrollment in a recognized course of study as defined in § 245a.3(b)(5) and issuance of a "Certificate of Satisfactory Pursuit" must occur subsequent to May 1, 1987.

(5) A course of study in the English language and in the history and government of the United States

shall satisfy the requirement of paragraph (b)(4)(i) of this section if the course materials for such instruction include textbooks published under the authority of section 346 of the Act, and it is

(i) Sponsored or conducted by: (A) An established public or private institution of learning recognized as such by a qualified state certifying agency; (B) An institution of learning approved to issue Forms I-20 in accordance with § 214.3 of this chapter; (C) A qualified designated entity within the meaning of section 245A(c)(2) of the Act, in goodstanding with the Service; or (D) Is certified by the district director in whose jurisdiction the program is conducted, or is certified by the Director of the Outreach Program nationally.

(ii) A program seeking certification as a course of study recognized by the Attorney General under paragraph (b)(5)(i)(D) of this section shall file Form I-803, Petition for Attorney General Recognition to Provide Course of Study for Legalization: Phase II, with the Director of Outreach for national level programs or with the district director having jurisdiction over the area in which the school or program is located. In the case of local programs, a separate petition must be filed with each district director when a parent organization has schools or programs in more than one INS district. A petition must identify by name and address those schools or programs included in the petition. No fee shall be required to file Form I-803;

(A) The Director of Outreach and the district directors may approve a petition where they have determined that (*1*) a need exists for a course of study in addition to those already certified under § 245a.3(b)(5)(i)(A), (B), or (C); and/or (*2*) of this chapter the petitioner has historically provided edu-

cational services in English and U.S. history and government but is not already certified under § 245a.3 (b)(5)(i)(A), (B), or (C); and (*3*) of this chapter the petitioner is otherwise qualified to provide such course of study;

(B) Upon approval of the petition the Director of Outreach and district directors shall issue a Certificate of Attorney General Recognition on Form I-804 to the petitioner. If the petition is denied, the petitioner shall be notified in writing of the decision therefor. No appeal shall lie from a denial of Form I-803, except that in such case where the petitions of a local, cross-district program are approved in one district and denied in another within the same State, the petitioner may request review of the denied petition by the appropriate Regional Commissioner. The Regional Commissioner shall then make a determination in this case;

(C) Each district director shall compile and maintain lists of programs approved under paragraph (b)(5)(i)(D) of this section within his or her jurisdiction. The Director of Outreach shall compile and maintain lists of approved national level programs.

(6) *Notice of participation.* All courses of study recognized under § 245a.3(b)(5)(i)(A) through (C) of this chapter which are already conducting or will conduct English and U.S. history and government courses for temporary residents must submit a Notice of Participation to the district director in whose jurisdiction the program is conducted. Acceptance of "Certificates of Satisfactory Pursuit" (Form I-699) shall be delayed until such time as the course provider submits the Notice of Participation, which notice shall be in the form of a letter typed on the letterhead of the course provider (if available) and include the following:

(i) The name(s) of the school(s)/program(s).

(ii) The complete addresses and telephone numbers of sites where courses will be offered, and class schedules.

(iii) The complete names of persons who are in charge of conducting English and U.S. history and government courses of study.

(iv) A statement that the course of study will issue "Certificates of Satisfactory Pursuit" to temporary resident enrollees according to INS regulations.

(v) A list of designated officials of the recognized course of study authorized to sign "Certificates of Satisfactory Pursuit", and samples of their original signatures.

(vi) A statement that if a course provider charges a fee to temporary resident enrollees, the fee will not be excessive.

(vii) Evidence of recognition under 8 CFR 245a.3 (b)(5)(i)(A), (B), or (C) (e.g., certification from a qualified state certifying agency; evidence of INS approval for attendance by non-immigrant students, such as the school code number, or the INS identification number from the QDE cooperative agreement).

The course provider shall notify the district director, in writing, of any changes to the information contained in the Notice of Participation subsequent to its submission within ten (10) days of such change.

A Certificate of Attorney General Recognition to Provide Course of Study for Legalization (Phase II), Form I-804, shall be issued to course providers who have submitted a Notice of Participation in accordance with the provisions of this section by the district director. A Notice of Participation deficient in any way shall be returned to the course provider to cor-

rect the deficiency. Upon the satisfaction of the district director that the deficiency has been corrected, the course provider shall be issued Form I-804. Each district director shall compile and maintain lists of recognized courses within his or her district.

(7) *Fee structure.* No maximum fee standard will be imposed by the Attorney General. However, if it is believed that a fee charged is excessive, this factor alone will justify non-certification of the course provider by INS as provided in § 245a.3(b)(10) and or (12) of this section. Once fees are established, any change in fee without prior approval of the district director or the Director of Outreach may justify decertification. In determining whether or not a fee is excessive, district directors and the Director of Outreach shall consider such factors as the means of instruction, class size, prevailing wages of instructors in the area of the program, and additional costs such as rent, materials, utilities, insurance, and taxes. District directors and the Director of Outreach may also seek the assistance of various Federal, State and local entities as the need arises (e.g., State Departments of Education) to determine the appropriateness of course fees.

(8) The Citizenship textbooks to be used by applicants for lawful permanent residence under section 245A of the Act shall be distributed by the Service to appropriate representatives of public schools. These textbooks may otherwise be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, and are also available at certain public institutions.

(9) *Maintenance of Student Records.* Course providers conducting courses of study recognized under § 245a.3(b)(5) of this chapter shall maintain for each student, for a period of three years from the stu-

dent's enrollment, the following information and documents:

(i) Name (as copied exactly from the I-688A or I-688);

(ii) A-number (90 million series);

(iii) Date of enrollment;

(iv) Attendance records;

(v) Assessment records;

(vi) Photocopy of signed "Certificate of Satisfactory Pursuit" issued to the student.

(10) *Issuance of "Certificate of Satisfactory Pursuit" (I-699).* (i) Each recognized course of study shall prepare a standardized certificate that is signed by the designated official. The Certificate shall be issued to an applicant who has attended a recognized course of study for at least 40 hours of a minimum of 60-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English and U.S. history and government course prescribed. Such standards shall conform with the provisions of § 245a.1(s) of this chapter.

(ii) The district director shall reject a certificate if it is determined that the certificate is fraudulent or was fraudulently issued.

(iii) The district director shall reject a Certificate if it is determined that the course provider is not complying with INS regulations. In the case of noncompliance, the district director will advise the course provider in writing of the specific deficiencies and give the provider thirty (30) days within which to correct such deficiencies.

(iv) District directors will accept Certificates from course providers once it is determined that the deficiencies have been satisfactorily corrected.

(v) Course providers which engage in fraudulent activities or fail to conform with INS regulations will be removed from the list of INS approved programs. INS will not accept Certificates from these providers.

(vi) Certificates may be accepted if a program is cited for deficiencies or decertified at a later date and no fraud was involved.

(vii) Certificates shall not be accepted from a course provider that has been decertified unless the alien enrolled in and had been issued a certificate prior to the decertification, provided that no fraud was involved.

(viii) The appropriate State agency responsible for SLIAG funding shall be notified of all decertifications by the district director.

(11) *Designated official.* (i) The designated official is the authorized person from each recognized course of study whose signature appears on all "Certificates of Satisfactory Pursuit" issued by that course;

(ii) The designated official must be a regularly employed member of the school administration whose office is located at the school and whose compensation does not come from commissions for recruitment of foreign students;

(iii) (A) The head of the school system or school, the director of the Qualified Designated Entity, the head of a program approved by the Attorney General, or the president or owner of other institutions recognized by the Attorney General must specify a *designated official.* Such designated official may not delegate this designation to any other person. Each school or institution may have up to three (3) designated officials at any one time. In a multi-campus institution, each campus may have up to three (3) designated officials at any one time;

(B) Each designated official shall have read and otherwise be familiar with the "Requirements and Guidelines for Courses of Study Recognized by the Attorney General". The signature of a designated official shall affirm the official's compliance with INS regulations;

(C) The name, title, and sample signature of each designated official for each recognized course of study shall be on file with the district director in whose jurisdiction the program is conducted.

(12) *Monitoring by INS.* (i) INS Outreach personnel in conjunction with the district director shall monitor the course providers in each district in order to:

(A) Assure that the program is a course of study recognized by the Attorney General under the provisions of § 245a.3(b)(5).

(B) Verify the existence of curriculum as defined in § 245a.1(u) on file for each level of instruction provided in English language and U.S. history and government classes.

(C) Assure that "Certificates of Satisfactory Pursuit" are being issued in accordance with § 245.3(b)(10).

(D) Assure that records are maintained on each temporary resident enrollee in accordance with § 245a.3(b)(9).

(E) Assure that fees (if any) assessed by the course provider are in compliance in accordance with § 245a.3(b)(7).

(ii) If INS has reason to believe that the service is not being provided to the applicant, INS will issue a 24-hour minimum notice to the service provider before any site visit is conducted.

(iii) If it is determined that a course provider is not performing according to the standards established in either § 245a.3(b)(10) or (12) of this chapter, the district director shall institute decertification proceedings. Notice of Intent to Decertify shall be provided to the course provider. The course provider has 30 days within which to correct performance according to standards established. If after the 30 days, the district director is not satisfied that the basis for decertification has been overcome, the course provider will be decertified. The appropriate State agency shall be notified in accordance with § 245a.3(b)(10)(viii) of this chapter. A copy of the notice of decertification shall be sent to the State agency.

(13) Courses of study recognized by the Attorney General as defined at § 245a.3(b)(5) of this chapter shall provide certain standards for the selection of teachers. Since some programs may be in locations where selection of qualified staff is limited, or where budget constraints restrict options, the following list of qualities for teacher selection is provided as guidance. Teacher selections should include as many of the following qualities as possible:

(i) Specific training in Teaching English to Speakers of Other Languages (TESOL);

(ii) Experience as a classroom teacher with adults;

(iii) Cultural sensitivity and openness;

(iv) Familiarity with competency-based education;

(v) Knowledge of curriculum and materials adaption;

(vi) Knowledge of a second language.

(c) *Ineligible aliens.* (1) An alien who has been convicted of a felony, or three or more misdemeanors in the United States.

(2) An alien who is inadmissible to the United States as an immigrant, except as provided in § 245a.3(g)(1).

(3) An alien who was previously granted temporary resident status pursuant to section 245A(a) of the Act who has not filed an application for permanent resident status under section 245A(b)(1) of the Act by the end of 43 months from the date of actual approval of the temporary resident application.

(4) An alien who was not previously granted temporary resident status under section 245A(a) of the Act.

(5) An alien whose temporary resident status has been terminated under § 245a.2(u) of this chapter.

(d) *Filing the application.* The provisions of part 211 of this chapter relating to the documentary requirements for immigrants shall not apply to an applicant under this part.

(1) The application must be filed on Form I-698. The application will be mailed to the designated Regional Processing Facility having jurisdiction over the applicant's residence. Form I-698 must be accompanied by the correct fee and documents specified in the instructions.

(2) *Certification of documents.* The submission of original documents is not required at the time of filing Form I-698. A copy of a document submitted in support of Form I-698 filed pursuant to section 245A(b) of the Act and this part may be accepted, though unaccompanied by the original, if the copy is certified as true and complete by

(i) An attorney in the format prescribed in § 204.2(j)(1) of this chapter; or

(ii) An alien's representative in the format prescribed in § 204.2(j)(2) of this chapter; or

(iii) A qualified designated entity (QDE) in good standing as defined in § 245a.1(r) of this chapter, if the copy bears a certification by the QDE in good-standing, typed or rubber-stamped in the following language:

I certify that I have compared this copy with its original and it is a true and complete copy.

Signed: _____

Date: _____

Name: _____

QDE in good-standing representative

Name of QDE in good-standing: _____

Address of QDE in good-standing: _____

INS-QDE Cooperative Agreement Number: _____

(iv) *Authentication.* Certification of documents must be authenticated by an original signature. A facsimile signature on a rubber stamp will not be acceptable.

(v) *Original documents.* Original documents must be presented when requested by the Service. Official government records, employment or employment-related records maintained by employers, unions, or collective bargaining organizations, medical records, school records maintained by a school or school board or other records maintained by a party other than the applicant which are submitted in evidence must

be certified as true and complete by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. At the discretion of the district director and/or the Regional Processing Facility director, original documents may be kept for forensic examination.

(3) A separate application (I-698) must be filed by each eligible application. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check or certified bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(4) Applicants who filed for temporary resident status prior to December 1, 1987, are required to submit the results of a serologic test for HIV virus on Form I-693, "Medical Examination of Aliens Seeking Adjustment of Status", completed by a designated civil surgeon, unless the serologic test for HIV was performed and the results were submitted on Form I-693 when the applicant filed for temporary resident status. Applicants who did submit an I-693 reflecting a serologic test for HIV was performed prior to December 1, 1987, must submit evidence of this fact when filing the I-698 application in order to be relieved from the requirement of submitting another I-693. If such evidence is not available, applicants may note on their I-698 application their prior submission of the results of the serologic test for HIV. This information shall then be verified at the Regional Processing Facility. Applicants having to submit an I-693 pursuant to this section are not required to have a complete medical examination. All HIV-positive applicants shall be advised that a waiver of the ground of excludability under section 212(a)(6) of the Act

is available and shall be provided the opportunity to apply for the waiver. To be eligible for the waiver, the applicant must establish that:

(i) The danger to the public health of the United States created by the alien's admission to the United States is minimal.

(ii) The possibility of the spread of the infection created by the alien's admission to the United States is minimal, and

(iii) There will be no cost incurred by any government agency without prior consent of that agency. Provided these criteria are met, the waiver may be granted only for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest in accordance with § 245a.3(g)(2) of this chapter.

(5) If necessary, the validity of an alien's temporary resident card (I-688) will be extended in increments of one (1) year until such time as the decision on an alien's properly filed application for permanent residence becomes final.

(6) An application lacking the proper fee or incomplete in any way shall be returned to the applicant with request for the proper fee, correction, additional information, and or documentation. Once an application has been accepted by the Service and additional information and or documentation is required, the applicant shall be sent a notice to submit such information and or documentation. In such case the application Form I-698 shall be retained at the RPF. If a response to this request is not received within 60 days, a second request for correction, additional information, and/or documentation shall be made. If the second request is not complied with by the end of 43 months from the date the application for temporary residence, Form I-687, was approved the application for permanent residence will be adjudicated on the basis of the existing record.

(e) *Interview.* Each applicant regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of Form I-551. Each applicant shall be interviewed by an immigration officer, except that the adjudicative interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant. An applicant failing to appear for the scheduled interview may, for good cause, be afforded another interview. Where an applicant fails to appear for two scheduled interviews, his or her application shall be held in abeyance until the end of 30 months from the date the application for temporary residence was approved and adjudicated on the basis of the existing record.

(f) *Numerical limitations.* The numerical limitations of sections 201 and 202 of the Act do not apply to the adjustment of aliens to lawful permanent resident status under section 245A(b) of the Act.

(g) *Applicability of exclusion grounds.*—(1) *Grounds of exclusion not to be applied.* The following paragraphs of section 212(a) of the Act shall not apply to applicants for adjustment of status from temporary resident to permanent resident status; (14) workers entering without labor certification; (20) immigrants not in possession of valid entry documents; (21) visas issued without compliance of section 203; (25) illiterates; and (32) graduates of non-accredited medical schools.

(2) *Waiver of grounds of excludability.* Except as provided in paragraph (g)(3) of this section, the Service may waive any provision of section 212(a)

of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is otherwise in the public interest. In any case where a provision of section 212(a) of the Act has been waived in connection with an alien's application for lawful temporary resident status under section 245A(a) of the Act, no additional waiver of the same ground of excludability will be required when the alien applies for permanent resident status under section 245A(b)(1) of the Act. In the event that the alien was excludable under any provision of section 212(a) of the Act at the time of temporary residency and failed to apply for a waiver in connection with the application for temporary resident status, or becomes excludable subsequent to the date temporary residence was granted, a waiver of the ground of excludability, if available, will be required before permanent resident status may be granted.

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provisions of the Act the following provisions of section 212(a) of the Act may not be waived by the Attorney General under paragraph (g)(2) of this section:

(i) Paragraphs (9) and (10) (criminals);

(ii) Paragraph (15) (public charge) except for an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act);

(iii) Paragraph (23) (narcotics), except for a single offense of simple possession of thirty grams or less of marijuana;

(iv) Paragraphs (27) (prejudicial to the public interest), (28) (communists), and (29) (subversives);

(v) Paragraph (33) (participated in Nazi persecution).

(4) *Determination of Likely to become a public charge* and Special Rule. Prior to use of the special rule for determination of public charge, paragraph (g)(4)(iii) of this section, an alien must first be determined to be excludable under section 212(a)(15) of the Act. If the applicant is determined to be *likely to become a public charge*, he or she may still be admissible under the terms of the Special Rule.

(i) In determining whether an alien is *likely to become a public charge* financial responsibility of the alien is to be established by examining the totality of the alien's circumstances at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income, and vocation.

(ii) The Special Rule for determination of public charge, paragraph (g)(4)(iii) of this section, is to be applied only after an initial determination that the alien is inadmissible under the provisions of section 212(a)(15) of the act.

(iii) *Special Rule.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable under paragraph (g)(3)(ii) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. The Special Rule is prospective in that the Service shall determine, based on the alien's

history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(5) *Public cash assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and or has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for proper adjudication may result in denial of the application.

(h) *Departure.* An applicant for adjustment to lawful permanent resident status under section 245A (b)(1) of the Act who was granted lawful temporary resident status under section 245A(a) of the Act, shall be permitted to return to the United States after such brief and casual trips abroad, as long as the alien reflects a continuing intention to adjust to lawful permanent resident status. However, such absences from the United States must not exceed the periods of time specified in § 245a.3(b)(2) of this chapter in order for the alien to maintain continuous residence as specified in the Act.

(i) *Decision.* The applicant shall be notified in writing of the decision, and, if the application is denied, of the reason therefor. Applications for permanent residence under this chapter will not be denied at

local INS offices (districts, suboffices, and legalization offices) until the entire record of proceeding has been reviewed. An application will not be denied if the denial is based on adverse information not previously furnished to the Service by the alien without providing the alien an opportunity to rebut the adverse information and to present evidence in his or her behalf. If inconsistencies are found between information submitted with the adjustment application and information previously furnished to the Service, the applicant shall be afforded the opportunity to explain discrepancies or rebut any adverse information. A party affected under this part by an adverse decision is entitled to file an appeal on Form I-694. If an application is denied, work authorization will be granted until a final decision has been rendered on an appeal or until the end of the appeal period if no appeal is filed. An applicant whose appeal period has ended is no longer considered to be an Eligible Legalized Alien for the purposes of the administration of State Legalization Impact Assistance Grants (SLIAG) funding. An alien whose application is denied will not be required to surrender his or her temporary resident card (I-688) until such time as the appeal period has tolled, or until expiration date of the I-688, whichever date is later. After exhaustion of an appeal, an applicant who believes that the grounds for denial have been overcome may submit another application with fee, provided that the application is submitted within his or her eligibility period.

(j) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit) the appellate authority designated in § 103.1(f)(2). Any appeal shall be submitted to the Regional Processing

Facility with the required fee within thirty (30) days after service of the Notice of Denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the thirty (30) day period has tolled will not be accepted. The thirty (30) day period for submitting an appeal begins three days after the notice of denial is mailed. If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional thirty (30) days will be allowed for this review from the time the Record of Proceeding is photocopied and mailed. A brief may be submitted with the appeal form or submitted up to thirty (30) calendar days from the date of receipt of the appeal form at the Regional Processing Facility. Briefs filed after submission of the appeal should be mailed directly to the Regional Processing Facility. For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Director of the Regional Processing Facility.

(k) *Motions.* The Regional Processing Facility director may reopen and reconsider any adverse decision *sua sponte.* When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision that will grant the benefit which has been requested. The director's new decision must be served on the appealing party within forty-five (45) days of receipt of any briefs and or new evidence, or upon expiration of the time allowed for the submission of any briefs.

(l) *Certifications.* The Regional Processing Facility director or district director may, in accordance with § 103.4 of this chapter, certify a decision to the

Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remanded back to either the Regional Processing Facility director or the district director will be certified to the Administrative Appeals Unit.

(m) *Date of adjustment to permanent residence.* The status of an alien whose application for permanent resident status is approved shall be adjusted to that of a lawful permanent resident as of the date of the filing of the application for permanent residence or the eligibility date, whichever is later. For purposes of making application to petition for naturalization, the continuous residence requirements for naturalization shall begin as of the date the alien's status is adjusted to that of a person lawfully admitted for permanent residence under this part.

(n) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Department of Justice or bureau of agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(2) No information furnished pursuant to an application for permanent resident status under this section shall be used for any purpose except: (i) To make a determination on the application; or (ii) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (n)(3) of this section.

(3) If a determination is made by the Service that the alien has, in connection with his or her application,

engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien and/or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(4) Information contained in granted legalization files may be used by the Service at a later date to make a decision (i) On an immigrant visa petition or other status filed by the applicant under section 204(a) of the Act; (ii) On a naturalization application submitted by the applicant; (iii) For the preparation of reports to Congress under section 404 of IRCA, or; (iv) For the furnishing of information, at the discretion of the Attorney General, in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13, United States Code.

(o) *Rescission.* Rescission of adjustment of status under 245a shall occur under the guidelines established in section 246 of the Act.

[54 FR 29449, July 12, 1989; 54 FR 43384, Oct. 24, 1989; as amended at 56 FR 31061, July 9, 1991]

§ 245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

(a) *Definitions.* As used in this section: (1) *Act* means the Immigration and Nationality Act, as

amended by the Immigration Reform and Control Act of 1986.

(2) *Service* means the Immigration and Naturalization Service (INS).

(3) *Resided continuously* means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

(i) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application. An alien who, after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States pursuant to the stateside criteria program, shall be considered as having *resided continuously.*

(4) *Continuous residence* means that the alien shall be regarded as having resided continously [*sic*] in the United States if, at the time of applying for adjust-

ment from temporary residence to permanent resident status: No single absence from the United States has exceeded 30 days, and the aggregate of all absences has not exceeded 90 days between the date on which lawful temporary resident status was granted and the date permanent resident status was applied for, unless the alien can establish that due to emergent reasons or extenuating circumstances beyond his or her control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than 30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent resident status, shall break the continuity of such residence unless the temporary resident can establish to the satisfaction of the district director that he or she did not, in fact, abandon his or residence in the United States during such period.

(5) *To make a determination* means obtaining and reviewing all information required to adjudicate an application for the benefit sought and making a decision thereon. If fraud, willful misrepresentation or concealment of a material fact, knowingly providing a false writing or document, knowingly making a false statement or representation, or any other activity prohibited by the Act is established during the process of making the determination on the application, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(6) *Continuous physical presence* means actual continuous presence in the United States since December

22, 1987, until filing of any application for adjustment of status. Aliens who were outside of the United States after enactment may apply for temporary residence if they reentered prior to March 21, 1988, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.

(7) *Brief, casual, and innocent* means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, for not more than 30 days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(8) *Brief and casual* means temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must not exceed the specific periods of time required in order to maintain continuous residence.

(9) *Certain nationals of countries for which extended voluntary departure has been made available on the basis of a nationality group determination at any time during the 5-year period ending on November 1, 1987* is limited to nationals of Poland, Afghanistan, Ethiopia, and Uganda.

(10) *Public cash assistance* means income or need-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

(11) *Designated entity* means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for legalization status.

(12) *Through the passage of time* means through the expiration date of the nonimmigrant permission to remain in the United States, including any extensions and or change of status.

(13) *Prima facie eligibility* means eligibility is established if the applicant presents a completed I-687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part.

(b) *Application for temporary residence*—(1) *Application for temporary residence.* (i) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan who has resided continuously in the United States since prior to July 21, 1984, and who believes that he or she meets the eligibility requirements of section 245A of the Act must make application within the 21-month period beginning on March 21, 1988, and ending on December 22, 1989.

(ii) An alien who fails to file an application for adjustment of status to that of a temporary resident under § 245A.4 of this part during the time period, will be statutorily ineligible for such adjustment of status.

(2) *Eligibility* (i) The following categories of aliens who are not otherwise excludable under section 212(a) of the Act are eligible to apply for status to that of a person admitted for temporary residence:

(A) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, (other than an alien who

entered as a nonimmigrant) who establishes that he or she entered the United States prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(B) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and whose period of authorized admission expired through the passage of time prior to January 21, 1985, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(C) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and who applied for asylum prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(D) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, who would otherwise be eligible for temporary resident status and who establishes that he or she resided continuously in the United States prior to July 21, 1984, and who subsequently reentered the United States as a nonimmigrant in order to return to an unrelinquished residence. An alien described in this paragraph must have received a waiver of 212(a)(19) as an alien who entered the United States by fraud.

(E) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and was a nonimmigrant who entered the United States in the classification A, A-1, A-2, G, G-1, G-2, G-3, or G-4, for Duration of Status (D/S), and whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 21, 1985, and who thereafter continued to reside in the United States.

(F) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and who was a nonimmigrant who entered the United States as an F, F-1 or F-2 for Duration of Status (D/S), and who completed a full course of studies, including practical training (if any), and whose time period to depart the United States after completion of studies expired prior to January 21, 1985, and who has thereafter continued to reside in the United States. Those students placed in a *nunc pro tunc* retroactive student status which would otherwise preclude their eligibility for legalization under this section, must present evidence that they had otherwise terminated their status during the requisite time period. A dependent F-2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I-94, Arrival-Departure Record that extended beyond July 21, 1984 is considered eligible if the principal F-1 alien is found eligible.

(3) *Ineligible aliens.* (i) An alien who has been convicted of a felony, or three or more misdemeanors.

(ii) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion.

(iii) An alien excludable under the provisions of section 212(a) of the Act whose grounds of excludability may not be waived.

(4) *Documentation.* Evidence to support an alien's eligibility for temporary resident status shall include documents establishing proof of identity, proof of nationality, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD-258), and a completed medical report of examination (Form I-693). All documentation submitted will be subject to Service verification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for the four categories of documentation are discussed as follows:

(i) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference;

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Driver's license or similar document issued by a state if it contains a photo;

(E) Baptismal Record/Marriage Certificate; or

(F) Affidavits.

(ii) *Proof of nationality.* Evidence to establish nationality is listed as follows:

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Other credible documents, including those created by, or in the possession of the INS, or any other documents (excluding affidavits) that, when taken singly, or together as a whole, establish the alien's nationality.

(iii) *Assumed names*—(A) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (b)(4)(i) and (ii) of this section. The assumed name must appear in the documentation provided by the applicants to establish eligibility. To meet the requirement of this paragraph, documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(B) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint, or detailed physical description. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to the affiant under the assumed name in question will carry greater weight.

(iv) *Proof of residence.*—Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(A) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, a state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organizations must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(1) Alien's address at the time of employment;

(2) Exact period of employment;

(3) Periods of layoff;

(4) Duties with the company;

(5) Whether or not the information was taken from official company records; and

(6) Where records are located, whether the Service may have access to the records.

If the records are unavailable, an affidavit form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of paragraphs (b)(4)(iv)(A)(*5*) and (*6*) of this section. This affidavit form letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's will-

ingness to come forward and give testimony if requested.

(B) Utility bills (gas, electric, phone, etc.) receipts, or letters from companies showing the dates during which the applicants received service are acceptable documentation.

(C) School records (letters, report cards, etc.) from the schools that the applicant or his or her children have attended in the United States must show the name of school and periods of school attendance.

(D) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(E) Attestations by churches, unions, or other organizations as to the applicant's residence by letter which:

(1) Identify applicant by name;

(2) Are signed by an official (whose title is shown);

(3) Show inclusive dates of membership;

(4) State the address where applicant resided during membership period;

(5) Include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(6) Establish how the author knows the applicant; and

(7) Establish the origin of the information being attested to.

(F) Additional documents to support the applicant's claim may include:

(1) Money order receipts for money sent into or out of the country;

(2) Passport entries;

(3) Birth certificates of children born in the United States;

(4) Bank books with dated transactions;

(5) Letters or correspondence between applicant and other person or organization;

(6) Social Security card;

(7) Selective Service card;

(8) Automobile license receipts, title, vehicle registration, etc.;

(9) Deeds, mortgages, contracts to which applicant has been a party;

(10) Tax receipts;

(11) Insurance policies, receipts, or letters; and

(12) Any other relevant document.

(v) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the Special Rule under paragraph (b)(11)(iv)(C) of this section will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(A) Evidence of a history of employment (i.e., employment letter, W-2 forms, income tax returns, etc.);

(B) Evidence that he she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(C) Form I-134. Affidavit of Support, completed by a spouse on behalf of the applicant and or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the Affidavit of Support shall be extended to other family members in unusual family circumstances.

Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

(vi) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification.

(vii) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

(5) *Filing of application.* (i) The application must be filed on Form I-687 at an office of a designated entity or at a Service office within the jurisdiction of the district where the applicant resides. If the application is filed with a designated entity, the alien must have consented to having the designated entity forward the application to the Service office. In the case of applications filed at a Service office, the district director may, at his or her discretion:

(A) Require the applicant to file the application in person; or

(B) Require the applicant to file the application by mail; or

(C) Permit the filing of applications whether by mail or in person.

The applicant must appear for a personal interview at the Service office as scheduled. If the applicant is 14 years of age or older, the application must be accompanied by a completed Form FD-258 (Applicant Card).

(ii) At the time of the interview, whenever possible, original documents must be submitted except the following: Official government records; employment or employment-related records maintained by employers, union, or collective bargaining organizations; medical records; school records maintained by

a school or school board; or other records maintained by a party other than the applicant. Copies of records maintained by parties other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. If at the time of the interview the return of the original document is desired by the applicant, the document must be accompanied by notarized copies or copies certified true and correct by a qualified designated entity or by the alien's representative in the format prescribed in § 204.2(j)(1) or (2) of this chapter. At the discretion of the district director, original documents, even if accompanied by certified copies, may be temporarily retained for forensic examination by the Document Analysis Unit at the Regional Processing Facility having jurisdiction over the Service office to which the documents were submitted.

(iii) A separate application (I-687) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check, or certified bank check, made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(6) *Filing date of application.* The date the alien submits a completed application to a Service office or designated entity shall be considered the filing date of the application, provided that in the case of an application filed at a designated entity the alien has consented to having the designated entity forward the application to the Service office having jurisdiction

over the location of the alien's residence. Designated entities are required to forward completed applications to the appropriate Service office within 60 days of receipt.

(7) *Selective Service registration.* At the time of filing an application under this section, male applicants over the age of 17 and under the age of 26, are required to be registered under the Military Selective Service Act. An applicant shall present evidence that he has previously registered under that Act in the form of a letter of acknowledgement from the Selective Service System, or such alien shall present a completed and signed Form SSS-1 at the time of filing Form I-687 with the Immigration and Naturalization Service or a designated entity. Form SSS-1 will be forwarded to the Selective Service System by the Service.

(8) *Continuous residence.* (i) For the purpose of this Act, an applicant for temporary residence status shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(A) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(B) The alien was maintaining a residence in the United States; and

(C) The alien's departure from the United States was not based on an order of deportation.

(ii) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

(9) *Medical examination.* (i) An applicant under this part shall be required to submit to an examination by a designated civil surgeon at no expense to the government. The designated civil surgeon shall report on the findings of the mental and physical condition of the applicant and the determination of the alien's immunization status on Form I-693, "Medical Examination of Aliens Seeking Adjustment of Status, (Pub. L. 99-603)". Results of the medical examination must be presented to the Service at the time of interview and shall be incorporated into the record. Any applicant certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

(ii) All applicants who filed for temporary resident status are required to include the results of a serological test for the HIV virus on the I-693. All HIV-positive applicants shall be advised that a waiver is available and shall be provided with the opportunity to apply for a waiver.

(10) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of Forms I-688A and I-688. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14 years of age, or when it is impractical because of the health or advanced age of the applicant.

(11) *Applicability of exclusion grounds.* (i) *Grounds of exclusion not to be applied.* Paragraphs (14), (workers entering without labor certification); (20), (immigrants not in possession of a valid entry document); (21), (visas issued without compliance with section 203); (25), (illiterates); and (32) (graduates of non-accredited medical schools) of section 212(a) of the Act shall not apply to applicants for temporary resident status.

(ii) *Waiver of grounds of exclusion.* Except as provided in paragraph (b)(11)(iii) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the Service office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the Service office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the

director of the Regional Processing Facility in whose jurisdiction the alien's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefore. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of section 103.3(a) of this chapter.

(iii) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (b)(11)(ii) of this section:

(A) Paragraphs (9) and (10) (criminals);

(B) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(C) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(D) Paragraph (33) (participated in Nazi persecution).

(iv) *Determination of Likely to become a public charge* and the special rule. (A) Prior to use of the special rule for determination of public charge, an alien must first be determined to be excludable under section 212(a)(15) of the Act. If the applicant is determined to be *likely to become a public charge*, he or she may still be admissible under the terms of the Special Rule.

(B) In determining whether an alien is *likely to become a public charge*, financial responsibility of the alien is to be established by examining the totality of the alien's circumstances at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income and vocation.

(C) An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level may be admissible under this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. The Special Rule is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(v) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and/or

has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

(12) *Continuous physical presence since December 22, 1987.* (i) An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since December 22, 1987. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to March 21, 1988, and meet the continuous residence requirements and are otherwise eligible for legalization.

(ii) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(13) *Departure.* (i) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service office and the date status as a temporary resident is granted, the alien application can be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in § 212.5(e) of this chapter.

(ii) An alien whose application for temporary resident status has been approved may be admitted to the

United States upon return as a returning temporary resident provided he or she:

(A) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(B) Has not been absent from the United States for more than 30 days on the date application for admission is made;

(C) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(D) Presents Form I-688;

(E) Presents himself or herself for inspection; and

(F) Is otherwise admissible.

(iii) The periods of time in paragraphs (b)(13)(ii)(B) and (C) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief and casual trip abroad due to emergent or extenuating circumstances beyond the alien's control.

(14) *Employment and travel authorization.*—(i) *General.* Authorization for employment and travel abroad for temporary resident status applicants under this section may be granted only by a Service office. INS district directions will determine the Service location for the completion of processing travel documentation. In the case of an application which has been filed with a designated entity, employment authorization may be granted by the Service only after the application has been properly received at the Service office.

(ii) *Employment and travel authorization prior to the granting of temporary resident status.* (A) Permission to travel abroad and accept employment may be granted to the applicant after an interview has been conducted in connection with an application establishing prima facie eligibilty for temporary resident status. Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in § 212.5(e) of this chapter after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status.

(B) If an appointment cannot be scheduled within 30 days, authorization to accept employment will be granted, valid until the scheduled appointment date. The appointment letter will be endorsed with the temporary employment authorization. Form I-688A, Employment Authorization, will be given to the applicant after an interview has been completed by an immigration officer unless a formal denial is issued by a Service office. This temporary employment authorization will be restricted to six-months duration, pending final determination on the application for temporary resident status.

(iii) *Employment and travel authorization upon grant of temporary resident status.* Upon grant of an application for adjustment to temporary resident status by a Regional Processing Facility, the processing facility will forward a notice of approval to the alien at his or her last known address, or to his or her legal representative. The alien will be required to return to the Service office where the application was initially received, surrender the I-688A previously issued, and obtain Form I-688, Temporary Resident Card, authorizing employment and travel abroad.

(iv) *Revocation of employment authorization upon denial of temporary resident status.* Upon denial of an application for adjustment to temporary resident status, the alien will be notified that if a timely appeal is not submitted, employment authorization shall be automatically revoked on the final day of the appeal period. An applicant whose appeal period has ended is no longer considered to be an Eligible Legalized Alien for the purposes of the administration of State Legalization Impact Assistance Grants (SLIAG) funding.

(15) *Decision.* The applicant shall be notified in writing of the decision. If the application is denied, the reason(s) for the decision shall be provided to the applicant. An appeal from an adverse decision under this part may be taken by the applicant on Form I-694.

(16) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit), the appellate authority designated in § 103.1(f)(2). Any appeal shall be submitted to the Regional Processing Facility (RPF) with the required fee within 30 days after service of the Notice of Denial in accordance with the procedures of § 103.3(a) of this chapter. An appeal received after the 30-day period will not be accepted. The 30-day period for submission of an appeal begins three days after the Notice of Denial is mailed as provided in § 103.5a(b) of this Act. If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional 30 days will be allowed for this review beginning at the time the ROP is mailed. A brief may be submitted with the appeal form or submitted up to

30 calendar days from the date of receipt of the appeal form at the RPF. Briefs filed after submission of the appeal should be mailed directly to the RPF. For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Director of the Regional Processing Facility.

(17) *Motions.* The Regional Processing Facility director may *sua sponte* reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the INS director of the Regional Processing Facility may issue a new decision granting the benefit which has been requested. The director's new decision must be served on the appealing party within 45 days of receipt of any briefs and/or new evidence, or upon expiration of the time allowed for the submission of any briefs. Motions to reopen a proceeding or reconsider a decision shall not be considered under this part.

(18) *Certifications.* The Regional Processing Facility director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remanded to the Regional Processing Facility director will be certified to the Administrative Appeals Unit.

(19) *Date of adjustment to temporary residence.* The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at the Service office.

(20) *Termination of temporary resident status.*—(i) *Termination of temporary resident status (General).* The status of an alien lawfully admitted for temporary residence under § 245a.4 of this part may be terminated at any time. It is not necessary that a final order of deportation be entered in order to terminate temporary resident status. The temporary resident status may be terminated upon the occurrence of any of the following:

(A) It is determined that the alien was ineligible for temporary residence under § 245a.4 of this part;

(B) The alien commits an act which renders him or her inadmissible as an immigrant unless a waiver is obtained, as provided in this part;

(C) The alien is convicted of any felony, or three or more misdemeanors;

(D) The alien fails to file for adjustment of status from temporary resident to permanent resident within 31 months of the date he or she was granted status as a temporary resident.

(ii) *Procedure.* Termination of an alien's status will be made only on notice to the alien sent by certified mail directed to his or her last known address, and, if applicable, to his or her representative. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within 30 days after the service of the Notice of Intent to Terminate. If the alien's status is terminated, the director of the Regional Processing Facility shall notify the alien of the decision and the reason for the termination, and further notify the alien that any Service Form issued to the alien authorizing employment and/or travel abroad, or any Form I-688, Temporary Resident Card previously

issued to the alien will be declared void by the director of the Regional Processing Facility within 30 days if no appeal of the termination decision is filed within that period. The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any-appeal along with the required fee, shall be filed with the Regional Processing Facility within 30 days after the service of the notice of termination. If no appeal is filed within that period, the official Service document shall be deemed void, and must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(iii) *Termination not construed as rescission under section 246.* For the purposes of this part the phrase *termination of status* of an alien granted lawful temporary residence under this section shall not be construed to necessitate a rescission of status as described in section 246 of the Act, and the proceedings required by the regulations issued thereunder shall not apply.

(iv) *Return to unlawful status after termination.* Termination of the status of any alien previously adjusted to lawful temporary residence shall act to return such alien to the status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under sections 236 or 242 of the Act, as appropriate.

(21) *Ineligibility for immigration benefits.* An alien whose status is adjusted to that of a lawful temporary resident under § 245a.4 of this part is not entitled to submit a petition pursuant to section 203 (a)(2), nor is such alien entitled to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence.

(22) *Declaration of intending citizen.* An alien who has been granted the status of temporary resident under § 245a.4 of this part may assert a claim of discrimination on the basis of citizenship status under section 274B of the Act only if he or she has previously filed Form I-772 (Declaration of Intending Citizen) after being granted such status. The Declaration of Intending Citizen is not required as a basis for filing a petition for naturalization; nor shall it be regarded as a right to United States citizenship; nor shall it be regarded as evidence of a person's status as a resident.

(23) *Limitation on access to information and confidentiality.* (i) No person other than a sworn officer or employee of the Department of Justice or bureau or agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(ii) No information furnished pursuant to an application for temporary or permanent resident status under this section shall be used for any purpose except:

(A) To make a determination on the application; or,

(B) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (b)(23)(iii) of this section.

(iii) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service

shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(iv) Information contained in granted legalization files may be used by the Service at a later date to make a decision on an immigrant visa petition (or other status petition) filed by the applicant under section 204(a), or for naturalization applications submitted by the applicant.

(c) *Adjustment from temporary to permanent resident status.* The provisions of § 245a.3 of this part shall be applied to aliens adjusting to permanent residence under this part.

[54 FR 6505, Feb. 13, 1989, as amended at 54 FR 29455, July 12, 1989; 54 FR 47676, Nov. 16, 1989]

§ 245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

(a) Except as provided in § 245a.5(b), any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 245A of the Act (Adjustment of Status of Certain Entrants Before January 1, 1982, to that of Person Admitted for Lawful Residence) or 210A of the Act (Determinations of Agricultural Labor Shortages and Admission of Additional Special Agricultural Workers) is ineligible, for a period of five years from the date such status was obtained, for benefits financed directly or indirectly, in whole or in part, through the programs identified in § 245a.5(c) of this chapter.

(b)(1) Section 245a.5(a) shall not apply to a Cuban or Haitian entrant (as defined in paragraph (1) or (2)(A) of section 501(e) of Pub. L. 96-422, as in effect on April 1, 1983), or in the case of assistance (other than aid to families with dependent children) which is furnished to an alien who is an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act).

(2) With respect to any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 210A of the Act only, assistance furnished under the Legal Services Corporation Act (42 U.S.C. 2996, et seq.) or Title V of the Housing Act of 1949 (42 U.S.C. 1471 et seq.) shall not be construed to be financial assistance referred to in § 245a.5(a).

(3) Section 245a.5(a) shall not apply to benefits financed through the programs identified in § 245a.5(c), which are marked with an asterisk (*), except to the extent that such benefits:

(i) Consist of, or are financed by, financial assistance in the form of grants, wages, loan, loan guarantees, or otherwise, which is furnished by the Federal Government directly, or indirectly through a State or local government or private entity, to eligible individuals or to private suppliers of goods or services to such individuals, or is furnished to a State or local government that provides to such individuals goods or services of a kind that is offered by private suppliers, and

(ii) Are targeted to individuals in financial need; either (A) in order to be eligible, individuals must establish that their income or wealth is below some maximum level, or, with respect to certain loan or loan guarantee programs, that they are unable to

obtain financing from alternative sources, or at prevailing interest rates, or at rates that would permit the achievement of programs goals, or (B) distribution of assistance is directed, geographically or otherwise, in a way that is intended to primarily benefit persons in financial need, as evidenced by references to such intent in the authorizing legislation.

(c) The programs of Federal financial assistance referred to in § 245a.5(a) are those identified in the list set forth below. The General Services Administration (GSA) Program Numbers set forth in the right column of the program list refer to the program identification numbers used in the Catalog of Federal Domestic Assistance, published by the United States General Services Administration, as updated through December, 1986.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45530